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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1152

FOX RIVER PATTERN, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute and Regulations Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6
Conclusion	10
Appendix	A1

AUTHORITIES CITED

Cases

Bohlman v. Big River Oil Co. (N. D.), 124 N. W. 2d 835 (1963)	7
Chapman v. El Paso Natural Gas Co., 204 F. 2d 46 (D. C. Cir. 1953)	8
Daisy's Originals, Inc. v. Miami of N. L. R. B., 468 F. 2d 493 (1972)	5, 9
General Steel Products, Inc. v. N. L. R. B., 445 F. 2d 1350 (4th Cir. 1971)	9
General Stencils, Inc. v. N. L. R. B., 438 F. 2d 894 (2d Cir. 1971)	9
Hunt v. Brown, 146 Mass. 253, 15 N. E. 587 (1888)	7
Jackson Manufacturing Company, 129 NLRB 460 (1960)	6
Keifer Oil & Gas Co. v. McDougal, 229 F. 993 (8th Cir. 1915)	7
Lincoln Bearing Co. v. N. L. R. B., 311 F. 2d 48 (6th Cir. 1962)	6

Local Lodge No. 1424, Machinists v. N. L. R. B., 362 U. S. 411 (1960) 7

N. L. R. B. v. American Cable Systems, 427 F. 2d 446 (5th Cir. 1970) 9

N. L. R. B. v. Bangor Plastics, Inc., 392 F. 2d 772 (6th Cir. 1968) 6

N. L. R. B. v. Bell Aerospace Co., No. 72-1598, *presently pending before the Court* 7

N. L. R. B. v. Gissel Packing Company, 395 U. S. 575 (1969) 2, 5, 9

N. L. R. B. v. Kostel Corp., 440 F. 2d 347 (7th Cir. 1971) 9

N. L. R. B. v. Lake Superior Lumber Corp., 167 F. 2d 147 (6th Cir. 1948) 7

N. L. R. B. v. Savair Mfg. Co., ... U. S. ....., 84 LRRM 2929 (1973) 7

N. L. R. B. v. Tennessee Bakers, Inc., 390 F. 2d 787 (6th Cir. 1968) 7

N. L. R. B. v. Zimnox Coal Company, 336 F. 2d 514 (6th Cir. 1964) 7

Peerless of America, Inc. v. N. L. R. B., ... F. 2d ..... 83 LRRM 3000 (7th Cir. 1973) 9

Rock Island, Ark. and La. R. R. Co. v. U. S., 254 U. S. 141 (1920) 7

Rogers Mfg. Co. v. N. L. R. B., ... F. 2d ....., 84 LRRM 2577 (6th Cir. 1973) 6

Saez v. Goslee, 463 F. 2d 214 (1st Cir. 1972), *cert. den.*, 409 U. S. 1024 (1972) 4

Sears, Roebuck and Co. v. N. L. R. B., 346 F. Supp. 741, n. 4 (D. D. C. 1972), *affirmed*, 480 F. 2d 1195 (D. C. Cir. 1973) 3

Sears, Roebuck and Co. v. N. L. R. B., 450 F. 2d 353 (8th Cir. 1971) *cert. den.*, 405 U. S. 996 (1972) 4

Terminal Freight Cooperative Assn. v. N. L. R. B., 447 F. 2d 1099 (3d Cir. 1971) *cert. den.*, 409 U. S. 1063 (1972) 3

United Drug Co., 146 NLRB 187 (1964) 6

Vaca v. Sipes, 386 U. S. 171 (1967) 3

Wallace Corp. v. N. L. R. B., 323 U. S. 248 (1948) .. 5, 6

Woodworth, Collector of Internal Revenue v. Kales, 26 F. 2d 178 (6th Cir. 1928) 8

Statutes and Regulations

National Labor Relations Act, as amended, 29 U. S. C. § 151, *et seq.*:

8(a)(1), (3) and (5) 3

9(c)(1) 2

9(c)(3) 7

Rules and Regulations of the National Labor Relations Board:

(29 C. F. R.) § 102.19 3

§ 102.63(b) 4

§ 102.67 4

Statements of Procedure of National Labor Relations Board:

(29 C. F. R.) § 101.4 3

§ 101.7 3

§ 101.9(c)(2) 4

N. L. R. B. Organization and Functions, 32 C. F. R. 9588, § 203.1 3

Miscellaneous

National Labor Relations Board, Thirty Seventh Annual Report of the National Labor Relations Board (1972) (G. P. O., 1972), pp. 15, 16 8

American Bar Assn., Section of Labor Relations Law, 1973 Committee Reports, Volume II (A. B. A., 1973), p. 248 9

Maguire & Zimet, "Hobson's Choice and Similar Practices in Federal Taxation," 48 Harv. L. R. 1281 (1935) .. 7

15 Am. Jur. 2nd "Compromise Settlement" § 19 7

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No.

FOX RIVER PATTERN, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Fox River Pattern, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on November 19, 1973.

OPINIONS BELOW

The order opinion of the Court of Appeals (App. A, pp. A1-A8) is not yet officially reported. The decision and order of the National Labor Relations Board (App. A, pp. A12A33) is reported at 199 NLRB No. 12.

JURISDICTION

The order opinion of the Court of Appeals for the Seventh Circuit (App. A, pp. A1-A8), enforcing the order of the National Labor Relations Board, issued on August 27, 1973. A

timely petition for rehearing *en banc* was denied on September 27, 1973 (App. C, p. A11) and the Court's judgment (App. B, p. A9) was entered on November 19, 1973. On December 18, 1973, Mr. Justice Rehnquist extended the time for filing a petition for writ of certiorari to and including January 25, 1974. (App. G, p. A57.) The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. May the National Labor Board, for the first time in its history, renege upon and unilaterally set aside a settlement agreement, previously entered into by the Board, the respondent and the charging party, absent either a breach of the agreement or the commission of subsequent violations of law?

2. Contrary to the decision below, but in accordance with the view of the Court of Appeals for the Fifth Circuit, do the standards of *N. L. R. B.* v. *Gissel Packing Company*, 395 U. S. 575 (1969), govern whether a fair decertification election should be held, as properly petitioned for by employees, rather than issuance of a remedial bargaining order?

STATUTE AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U. S. C. § 151 *et seq.* ("the Act"), and the pertinent rules and regulations adopted by the Board pursuant thereto, are set forth in Appendix H at pp. A58-A60.

STATEMENT OF THE CASE

The facts are not in dispute. On July 27, 1971, employees of Petitioner Company filed a decertification petition with the Regional Director of the Board's Chicago office, as agent for the Board, praying that, pursuant to Section 9(c)(1) of the Act, an election be held to determine whether the employees

desired to continue to be represented by the Pattern, Mold and Model Makers Union. Thereafter, on August 2 and 29, 1971, the Union filed unfair labor practice charges with the Regional Director, as agent for the Board's General Counsel,[1] alleging that the Company had violated Sections 8(a)(1), (3) and (5) of the Act by threatening and interrogating employees, by discharging employee Keith Lambert, by improperly withholding certain monies from the Union's pension fund and by unlawfully refusing to bargain with the Union. After investigating the charges, the Regional Director commenced, as provided for in Section 101.7 of the Board's Statements of Procedure (App. H, p. A6), negotiations to settle the charges and avoid litigation. The product of these negotiations eventually was a settlement agreement (App. F, pp. A52-A56) entered into on October 20, 1971 by the Company, the Board's General Counsel, the Union, and subsequently approved by the Regional Director. The agreement, which was final and binding on all parties,[2] was care-

1. The Board and its General Counsel, although separate agencies (see, e.g., *Sears, Roebuck and Co.* v. *N. L. R. B.*, 346 F. Supp. 751, n. 4 (D. D. C. 1972), *aff'd.*, 480 F. 2d 1195 (D. C. Cir. 1973)), are each represented at the regional level by the regional director. See 26 C. F. R. § 3911; and National Labor Relations Board, Organization and Function, § 203.1, 32 C. F. R. 9588, as amended, § 203.1.

2. The Regional Director's approval of the settlement agreement derived from the General Counsel's final and unreviewable authority, pursuant to Section 3(d) of the Act (App. H, p. A58), to determine whether, after investigation of a charge, complaint should issue. See, *e.g.*, *Vaca* v. *Sipes*, 386 U. S. 171, 182 (1967); *Saez* v. *Goslee*, 463 F. 2d 214 (1st Cir. 1972), *cert. den.*, 409 U. S. 1024 (1972); and N. L. R. B. Statement of Procedure, § 101.4, 20 C. F. R. § 101.4. Contrary to the assumption of the court below (App. A, p. A7, n. 6), the agreement was *not* reviewable by the Board. See *Terminal Freight Cooperative Assn.* v. *N. L. R. B.*, 447 F. 2d 1099 (3rd Cir. 1971), *cert. den.*, 409 U. S. 1063 (1972); N. L. R. B. Statement of Procedure, §§101.7, 102.19, 29 C. F. R. §§ 101.7, 102.19. See also the Board's decision in this case, App. C, p. A21, n. 4 (". . . as no complaint had issued, Board jurisdiction did not attach, and the power to approve or disapprove the settlement lay solely, under the statutory separation of powers, with the Regional Director and the General Counsel as, indeed, the face of the settlement agreement indicates"). The court below apparently confused the

fully designed to dispose of all outstanding charges: employee Lambert was offered reinstatement and made whole for all wages and benefits lost; the Company was to make certain payments to the Union's pension fund; cease and desist notices were to be prominently displayed by the Company to remedy the alleged unlawful threats and interrogation; and, with respect to the refusal to bargain charge, it was expressly agreed that the Company would bargain with the Union if, in the event of an appeal from the Regional Director's contemplated dismissal of the decertification petition,[3] the Board affirmed the Regional Director. Although the Regional Director thereafter did dismiss the petition on October 22, the Board, instead of ruling on the employees' subsequent appeal, remanded the petition to the Regional Director for "further appropriate action . . ." (App. E, p. A18.) The Company in the meantime, in accord with the settlement agreement's requirement that performance therewith "commence immediately after the Agreement is approved by the Regional Director", had fully complied with its notice-posting obligations and its commitments with respect to employee Lambert and the Union's pension fund. No intervening unfair labor practices had occurred.

On December 30, 1971, the Regional Director, notwithstanding the Company's undisputed compliance with the settlement agreement, nevertheless reneged on the agreement, declared it null and void and issued a complaint. The Company, as a result, was forced to litigate the charges and deprived of the results, including even restitution of the funds it had paid out

instant informal, pre-complaint settlement agreement with the differing procedure involved where there is a formal or post-complaint settlement agreement; in the latter situation, since Board jurisdiction has attached, the settlement process expressly provides for Board review. See, *e.g.*, *Sears, Roebuck and Co.* v. *N. L. R. B.*, 450 F. 2d 353 (8th Cir. 1971), *cert. den.*, 405 U. S. 996 (1972); N. L. R. B. Statement of Procedure, § 101.9(c)(2), 29 C. F. R. § 101.9(c)(2).

3. An appeal procedure to the Board itself from a regional director's dismissal of a decertification petition is provided for in the Board's Rules and Regulations, §§ 102.63(b), 102.67; 29 C. F. R. §§ 102.63(b), 102.67.

(App. E, pp. A24-25, n. 8), that it expected would flow from the settlement agreement. A decertification petition filed by the Company's employees on January 2, 1973—after the notice-posting period had been completed and the taint of any unfair labor practices presumably removed—was also dismissed by the Regional Director.

The Board subsequently approved the Regional Director's disavowal of the settlement agreement and ordered the Company to undertake essentially the same remedial actions as had already occurred and, in addition, to bargain with the Union. (App. D, p. A13.) Upon the Company's request for review, the Court of Appeals for the Seventh Circuit, Circuit Judge Pell dissenting,[4] affirmed. (App. A, pp. A1-A8.) The Court held that, under this Court's decision in *Wallace Corp.* v. *N. L. R. B.*, 323 U. S. 248 (1948), the Board was authorized "to disavow [any] settlement agreement which [it concluded] would frustrate the Act"; that it was not limited to disavowing only those agreements which had been breached or in which intervening violations of law had occurred. (App. A, pp. A5-A6.) The Court also upheld the Board's imposition of a bargaining order on the ground that the criteria for such an order set forth in *N. L. R. B.* v. *Gissel Packing Co.*, 395 U. S. 575 (1969), were applicable only to those cases where a union's majority status "had not previously been established." (App. A, p. A7.) No mention was made of the contrary decision of the Fifth Circuit in *Daisy's Originals, Inc. of Miami* v. *N. L. R. B.*, 468 F. 2d 493 (1972).

4. Judge Pell adopted the arguments advanced in the briefs of the Company and would have set aside the Board's order. He argued that the government should not be permitted to "renege . . . on its approval and the company which had complied with its part of the agreement . . . [should not now find] itself deprived of a part of the bargain, the right to have determined the representative status of the union." App. A, p. A8.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court: When May a Government Agency Renege on a Previously Approved Settlement Agreement?

This is the first case in the thirty-eight year history of the Act where an all-party settlement agreement, expressly providing that "no further action shall be taken" and subject to no further review, has subsequently been disavowed by the Board absent either a violation thereof or the commission of new unfair labor practices. The courts of appeals, as well as the Board itself, had heretofore uniformly ruled that the Board had no such power; that "it is only when a party to the settlement agreement has breached its terms or has committed further illegal acts, that the regional director is justified in setting aside a settlement agreement and issuing a formal complaint." *N. L. R. B.* v. *Bangor Plastics, Inc.*, 392 F. 2d 772, 775 (6th Cir. 1968); see also, e.g., *Rogers Manufacturing Co.* v. *N. L. R. B.*, ... F. 2d ....., 84 LRRM 2577 (6th Cir. 1973); *Lincoln Bearing Co.* v. *N. L. R. B.*, 311 F. 2d 48, 50 (6th Cir. 1962); *Jackson Manufacturing Company*, 129 NLRB 460, 462 (1960); and *United Drug Co.*, 146 NLRB 187, 189 (1964).[5] The reasons for this

5. The court of appeals' reliance (App. A, pp. A5-A6) on *dicta* in *Wallace Corp.* v. *N. L. R. B.*, 323 U. S. 248, 254 (1948), is misplaced. There, in a case where a settlement agreement was found to have been properly set aside due to subsequent violations of that agreement, this Court indicated the Board could go behind an agreement only "where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose . . ." The quoted language, however, does not sanction, as viewed by the court below, that agreements can be found to have "failed to accomplish their purpose" where there have been no subsequent violations thereof. It was a post-agreement violation—"the wholesale discard of employees as a result of their union affiliation"—which *Wallace* held to have "defeated" the "purpose of the settlement in that case." 323 U. S. at 254. Conversely, in the absence of such a violation, there is no indication that the Court would have

rule is clear: the need to preserve the "government's reputation for fair dealing with its citizens" (*N. L. R. B.* v. *Tennessee Packers, Inc.*, 390 F. 2d 787, 788 (6th Cir. 1968));[6] the policy of the Act to bar litigation over stale events, stabilize existing bargaining relationships and encourage the voluntary settlement of labor disputes;[7] and the general legal principle that the settlement of a lawsuit, unless there is a claim of fraud or subsequent breach thereof, will not be set aside on the ground that one of the parties has struck an "unfair" bargain.[8]

Here, the Board and court below, without advance warning prior to the parties entering into the settlement agreement,[9] have

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permitted the Board to renege, as in this case, on its agreement. Similarly, in the other cases relied on by the court below, there was a situation, in contrast to the instant case, where either Board approval was required and not obtained (*N. L. R. B.* v. *Tennessee Packers, Inc., supra*), or where no settlement agreement had ever been executed (*N. L. R. B.* v. *Zimnox Coal Company*, 336 F. 2d 514 (6th Cir. 1964)) or where there was a subsequent breach by the respondent of its obligations under the agreement (*N. L. R. B.* v. *Lake Superior Lumber Corp.*, 167 F. 2d 147 (6th Cir. 1948)).

6. And while this Court has noted that "Men must turn square corners when they deal with the Government" (*Rock Island, Ark. & La. R. R. Co.* v. *U. S.*, 254 U. S. 141, 143 (1920)) commentators have aptly responded that "[I]t is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens." Maguire & Zimet, "Hobson's Choice and Similar Practices in Federal Taxation," 48 Harv. L. Rev. 1281, 1299 (1935).

7. See, *e.g.*, *Local Lodge No. 1424, Machinists* v. *N. L. R. B.*, 362 U. S. 411, 419 (1960), § 9(c)(3) of the Act, 29 U. S. C. § 159(c)(3).

8. See, e.g., 15 Am. Jur. 2d "Compromise and Settlement" § 19; *Keifer Oil & Gas Co.* v. *McDougal*, 229 F. 933 (8th Cir. 1915); *Hunt* v. *Brown*, 146 Mass. 253, 15 N. E. 587 (1888); and *Bohlman* v. *Big River Oil Co.* (N. D.), 124 N. W. 2d 835 (1963).

9. This case thus presents yet another example this Term of the Board unilaterally changing major policies without prior notice or utilization of its rule making powers. See, e.g., *N. L. R. B.* v. *Bell Aerospace Co.*, No. 72-1598, presently pending before the Court; and *N. L. R. B.* v. *Savair Manufacturing Co.*, ... U. S. ...., 84 LRRM 2929 (1973).

promulgated a totally new standard: that the government can unilaterally renege upon and set aside a fully-executed settlement agreement if, in its sole discretion, it subsequently decides that the agreement is no longer satisfactory. This new criterion has serious, widespread ramifications:

First, presumably the same right to disavow agreements solemnly entered into would also apply to other administrative agencies[10] with a corollary adverse impact on the established principles of "fair dealing" which have hopefully governed their relations with the public.

Second, the new test for Board disavowal of settlement agreements will cause a severe dislocation in the administration of the Act. Respondents who may, at agency discretion, be deprived of their part of a settlement bargain will surely be loathe to enter into such agreements. Since settlement agreements are an essential tool[11] in the Board's ability to handle its rapidly-increasing unfair labor practice

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10. See e.g., *Woodworth, Collector of Internal Revenue* v. *Kales*, 26 F. 2d 178, 180-181 (6th Cir. 1928) where the Court held that the Commissioner, having assessed the valuation of a Company's stock for taxation purposes, could not thereafter revoke the assessment and reassess an additional tax upon a new valuation upon a "matured and better judgment," in the absence of fraud, mistake, or clear statutory authority, because, as in the instant case, such agency action is "pregnant with the danger of official oppression." And see *Chapman* v. *El Paso Natural Gas Co.*, 204 F. 2d 46, 53-54 (D. C. Cir. 1953), wherein the Secretary of Interior sought to renege upon and add to his previously issued decision containing conditions for the grant of a right of way permit to a party. The court rejected this attempt and held the Secretary to his agreement, observing that "a decision may not be repudiated for the sole purpose of applying some . . . change in administrative policy, particularly where, as here, considerable funds have been expended in justifiable reliance upon the earlier ruling."

11. In fiscal 1972, 93.3 percent of a record-high volume of 25,555 unfair labor practice cases were closed by the Board's regional offices. Of those cases administratively determined to have merit, 56 percent were closed by precomplaint settlements and adjustments. *Thirty Seventh Annual Report of the National Labor Relations Board* (1972) (G. P. O., 1972), pp. 15, 16.

caseload,[12] any erosion of the settlement process necessarily assumes critical importance.

And finally, the undermining of the public's confidence in its dealings with the government—the belief that, if a party complies with its undertakings, the government will not renege on its part of the bargain—cannot, particularly at this stage in our Nation's history, be underemphasized. Public confidence in the institutions of government needs to be strengthened rather than, as will be the concomitant effect of the decision below, severely vitiated.

The Court of Appeals, in sum, has approved a new and unwarranted Board practice with manifold substantial unsettling consequences. Review by this Court is, therefore, warranted.

2. The Decision Below Conflicts with the View of Another Court of Appeals as to the Proper Interpretation to Be Given This Court's Decision in N. L. R. B. v. Gissel Packing Company, 395 U. S. 575 (1969).

In *N. L. R. B.* v. *Gissel Packing Company*, 395 U. S. 575 (1969), this Court enunciated guidelines to determine when a remedial bargaining order could be utilized, instead of the preferred route of a Board representation election and certification, to ascertain employee choice of a bargaining representative. As demonstrated by the decision of the Court of Appeals for the Fifth Circuit in *Daisy's Originals, Inc. of Miami* v. *N. L. R. B.*, 468 F. 2d 493 (1972), the *Gissel* standards are equally applicable for determining whether a fair *decertification* election may be held in lieu of issuance of a bargaining order. Contrary to the decision of the Fifth Circuit, however, the court below limited

12. See, e.g., American Bar Assn., Section of Labor Relations Law, *1973 Committee Reports, Volume II* (A. B. A., 1973), p. 248. (". . . [Board] Chairman [Miller] made clear the sentiment of all members of the Board that the problem of capacity of the Board to handle its present caseload was very near to crisis dimensions").

the applicability of the *Gissel* tests to only those situations where a union's majority status "had not been previously determined." App. A, p. A7. The Seventh Circuit, accordingly, did not require, as both it and other courts of appeals have insisted upon in the representation case context, that the Board make a "detailed analysis" as to the severity of the employer's unfair labor practices, the possibility of holding a fair election and the potential effectiveness of less drastic remedies.[13]

The continued existence of different standards respecting issuance of bargaining orders in decertification cases impairs the uniformity of national labor policy that the Act was designed to achieve. The importance of this issue is underscored by the fact that improper issuance of a bargaining order, instead of holding a decertification election, directly frustrates the cornerstone of employee free choice upon which the Act is predicated. This case presents an appropriate vehicle to resolve this decisional conflict and provide guidelines for the Board and lower courts with respect to the correct interpretation of *Gissel*.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted.

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13. See, e.g., *N. L. R. B.* v. *Kostel Corporation*, 440 F. 2d 347, 351 (7th Cir. 1971); *Peerless of America, Inc.* v. *N. L. R. B.*, ... F. 2d ...., 83 LRRM 3000 (7th Cir. 1973); *General Stencils, Inc.* v. *N. L. R. B.*, 438 F. 2d 894 (2nd Cir. 1971); *General Steel Products, Inc.* v. *N. L. R. B.*, 445 F. 2d 1350 (4th Cir. 1971); and *N. L. R. B.* v. *American Cable Systems*, 427 F. 2d 446 (5th Cir. 1970).

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued May 31, 1973

August 27, 1973

Before

HON. JOHN W. REYNOLDS, *Chief District Judge**
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*

FOX RIVER PATTERN, INC., *Petitioner,*
No. 72-1807 *vs.*
NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

ORDER

The Board found that the company had violated § 8(a)(1), (3) and (5) of the National Labor Relations Act, 29 U. S. C. § 158(a)(1), (3) and (5).[1] The company argues that the Board's order is barred by a settlement agreement which was approved by the Regional Director and that, in any event, its unfair labor practices did not justify the entry of a bargaining order. We find no merit in either contention.

* Chief District Judge John W. Reynolds of the United States District Court for the Eastern District of Wisconsin is sitting by designation.

1. The Board's order is reported at 199 N. L. R. B. No. 12.

In a collective bargaining agreement expiring on May 1, 1971, the company recognized the Union[2] as the exclusive bargaining representative of its pattern makers. On February 26, 1971, the Union notified the company of the contract's expiration and requested negotiations for a new agreement. During the period between early March and July 27, 1971, the company engaged in a series of acts which clearly support the Board's conclusion that it violated § 8(a)(1), (3) and (5) of the Act. This conduct included offers of financial inducement to individual employees, the discharge of a Union leader, improper interrogation of individual employees, adamant refusal to negotiate in good faith at a Union bargaining session on May 18, and unlawful negotiation with individual employees at a meeting on June 4, 1971. We have no doubt as to the sufficiency of the evidence that the company refused to bargain in good faith with the Union pursuant to the notice of February 26.

On July 27, a decertification petition (Case No. 13-RD-819) was filed by employee Schmidt with the support of the requisite 30% of the unit. On August 2 and September 29, the Union filed the unfair labor practice charges which ultimately resulted in the Board's order now under review.

On October 20, prior to issuance of a complaint, the Regional Director approved the settlement agreement which is relied on by the company as a bar to the bargaining order subsequently entered by the Board. The parties to the settlement agreement included the company and the Union but not employee Schmidt who had filed the decertification petition. Although the settlement agreement was obviously intended to resolve all pending matters, it was incomplete in material respects. As far as the § 8(a)(1) and (3) issues were concerned, the agreed remedy was complete and the direction to take remedial action was promptly and fully met by the company. As for the decertifi-

2. Pattern, Mold and Model Makers' Association of Chicago and vicinity, affiliated with the Pattern Makers' League of North America, AFL-CIO.

cation petition and the refusal to bargain, however, the terms of the agreement were plainly inadequate. in one provision, the company agreed to bargain with the Union if "the dismissal of the petition in Case No. 13-RD-819 is either not appealed, or if appealed is sustained by the Board and no valid question concerning representation exists . . ." A. 30. Manifestly, it was anticipated that the Regional Director would promptly dismiss the decertification petition, but Schmidt did not join in the settlement and, of course, did not waive his right to review of the comtemplated dismissal.

Two days later the Regional Director did dismiss Schmidt's decertification petition:

> "From the investigation, the evidence shows that, pursuant to a Settlement Agreement . . . the Employer has agreed to bargain with the Union and, therefore, no question concerning representation exists. I am, therefore dismissing the petition in this matter." Regional Director's letter dated October 22, 1971.

When Schmidt appealed, the company filed a memorandum with the Board supporting the appeal. Since the employees seeking decertification were not parties to the settlement, the Board promptly vacated the Regional Director's action and directed: "[E]ither process the instant petition or proceed to a definitive disposition of the refusal to bargain charge . . ." A. 32. The Board ruled in effect that Schmidt's petition must be processed unless the unfair labor practices charged by the Union justified invocation of the Board's blocking charge rule.[3]

The company insists that the Regional Director was then obligated to process Schmidt's petition and hold an election because the settlement had "remedied" all unfair labor practices. It was clear at this point, however, that the settlement agreement had not provided any remedy for the refusal to bargain

3. Under the blocking charge rule the Board will not ordinarily process a decertification petition while unfair labor practice charges are pending.

with the Union. The Acting Regional Director withdrew approval of the settlement and issued the instant complaint. On January 7, 1972, employee Schmidt filed a second decertification petition (Case No. 13-RD-833). The Regional Director dismissed that petition, as well as Schmidt's first petition, on January 26, 1972, finding no valid question concerning representation since the unfair labor practice complaint had issued. The Board affirmed this action of February 9, 1972.

If the settlement agreement had been in effect on February 9, the company would then have been under a contractual obligation to bargain with the Union. For the settlement expressly provided that the company would bargain if the dismissal of the petition was "sustained by the Board and no valid question concerning representation exists." The Board approved the Regional Director's finding to that effect and subsequently held that "any loss of [the Union's] majority which might have occurred . . . is attributable to these unfair labor practices." A. 21. Thus, it appears to us that resurrection of the settlement agreement would have had the same practical consequence as the entry of the Board order under review.

Nevertheless, the company contends that the order was barred by the outstanding settlement agreement which the Board is powerless to set aside "absent either a finding of a 'breach of the agreement or a subsequent independent violation of the Act by parties to the agreement.' *Lincoln Bearing Company* v. *N. L. R. B.*, 311 F. 2d 48, 50 (6th Cir. 1962)." Company brief at 6. In this case we have no doubt that the Board had the power to withhold its approval of the settlement between the Union and the company which the Regional Director had approved and that it was wise for the Board to do so. We are fully conscious of the widespread use of settlement agreements in the Board's operations[4] and recognize the importance of

4. In fiscal 1970, the Board closed 5,198 cases by settlement. This figure represents 83% of all closed cases other than those closed by dismissal or withdrawal of the charge. Board's Brief at 11 n. 16.

"protecting the government's reputation for fair dealing with its citizens." *N. L. R. B.* v. *Tennessee Packers, Inc.*, 390 F. 2d 787, 788 (6th Cir. 1968). However, it is generally up to the Board to determine its policy toward settlements.

In *Wallace Corp.* v. *N. L. R. B.*, 323 U. S. 248, the Supreme Court held that traditional contract doctrines, such as the doctrine of estoppel, could not be used to force the Board to honor settlements:

> "With reference to the attempted settlement of disputes, as in the performance of other duties imposed upon it by the Act, the Board had power to fashion its procedure to achieve the Act's purpose to protect employees from unfair labor practices. We cannot, by incorporating the judicial concept of estoppel into its procedure, render the Board powerless to prevent an obvious frustration of the Act's purposes." *Id.* at 253.

The *Wallace* case clearly authorizes the Board to disavow a settlement which would frustrate the purposes of the Act.[5] While it is true that the Court, as well as the Board, in *Wallace* relied on unfair labor practices subsequent to the settlement, the language of that opinion sweeps a broader path:

> "The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them. The attempted settlement here wholly failed to prevent the wholesale discard of employees as a result of their union affiliation. The purpose

5. The company cites five Sixth Circuit opinions in support of its argument. *NLRB* v. *Tennessee Packers, Inc.*, 390 F. 2d 787 (6th Cir. 1968); *NLRB* v. *Zimnox Coal Co.*, 336 F. 2d 516 (6th Cir. 1964); *Lincoln Bearing Co.* v. *NLRB*, 311 F. 2d 48 (6th Cir. 1962); *NLRB* v. *Superior Tool & Die Co.*, 309 F. 2d 692 (6th Cir. 1962); *NLRB* v. *Lake Superior Lumber Corp.*, 167 F. 2d 147 (6th Cir. 1948). The cited cases do not support the company's contention. *Tennessee Packers*, *Lake Superior Lumber*, and *Zimnox* strongly support the Board. In *Lincoln Bearing* and *Superior Tool*, the Board had relied on unsubstantiated subsequent unfair labor practices to set aside an agreement; and the court merely held the Board to its own logic.

> of the settlement was thereby defected. Upon this failure, when the Board's further action was properly invoked, it became its duty to take fresh steps to prevent frustration of the Act. To meet such situations the Board has established as a working rule the principle that it ordinarily will respect the terms of a settlement agreement approved by it. It has consistently gone behind such agreements, however, where subsequent events have demonstrated that efforts at adjustment *have failed to accomplish their purpose*, or where there has been a subsequent unfair labor practice." *Id.* at 254 (emphasis added) (footnote deleted).

The company's argument that the Board's power to vacate settlement agreements is limited to cases in which subsequent unfair labor practices have occurred is plainly unsupported by *Wallace*.

Since the ultimate objective of the company's campaign was to undermine the Union's majority status, the purpose of the October settlement was not merely to terminate the specific unfair labor practices which had been committed, but, more importantly, to bring about collective bargaining if no valid question of representation existed. Originally the Regional Director believed he could dismiss the decertification petition as a part of the settlement. As the company appears to have anticipated, that belief was mistaken. The Board quite properly directed him to process either the decertification petition or the unfair labor practice charges; for certainly a settlement between the company and the Union should not foreclose a valid attack on the Union's representative status.

On the other hand, it is equally clear that if essential support for the decertification petition was the result of the company's unfair labor practices, no valid representation question would exist and collective bargaining should be promptly commenced. The question of which of the two alternatives the Regional Director should pursue—either to abide by the settlement and process the decertification petition or else to withdraw approval of the settlement and process the complaint—was to be answered

largely on the basis of his appraisal of the seriousness of the charges against the Company. We have no doubt that the Board had the power to authorize him to pursue either course,[6] and, on the basis of the well supported findings, that the choice he made was permissible.

The company also challenges the bargaining order on the ground that the decertification petitions relieved it of any obligation to bargain with the Union. But since the first decertification petition was not filed until July 27, 1971, it certainly could not justify the company's earlier refusal to bargain in good faith.

The company seems to contend that the bargaining order was improper unless it had engaged in "outrageous" and "pervasive" unfair labor practices, see *N. L. R. B.* v. *Gissel Packing Co.*, 395 U. S. 575, 613-614. But that language described the justification for the entry of an order requiring bargaining with a Union whose majority status had not previously been established. In this case, the company's refusal to bargain occurred when the Union had the unquestioned authority to represent the unit employees.

The Board's findings are supported by substantial evidence. The company consistently refused to bargain with its employees' recognized bargaining representative.[7] Schmidt's decertification petition did not relieve it of that obligation. Nor did the

6. Unlike the agreement considered by the Court in *Wallace*, the Board never formally approved the October agreement. Generally, the Board is not required to honor a settlement which it has not itself approved. The Sixth Circuit put it quite strongly. "The National Labor Relations Act has committed exclusive authority pertaining to remedial measures for unfair labor practices to the Board itself, subject only to judicial review. 29 U. S. C. § 160(C) (1964). As a matter of law no 'settlement' can be binding until and unless it has Board approval." *NLRB* v. *Tennessee Packers, Inc.*, 390 F. 2d 787, 788 (6th Cir. 1968). See also *NLRB* v. *Armstrong Tire & Rubber Co.*, 263 F. 2d 680 (5th Cir. 1959).

7. Indeed, it continued to refuse to bargain even after the decertification petitions were finally dismissed, apparently on the theory that the settlement relieved it of its statutory duty to bargain.

settlement agreement. Consequently, the company's petition for review is denied, and the Board's cross-petition for enforcement is granted.

ENFORCEMENT GRANTED.

PELL, *Circuit Judge*, dissenting.

At the risk of oversimplifying a case which was somewhat confusingly presented to us, we have here a labor dispute which has been settled by an agreement between the company, its union and the Board's General Counsel, which agreement was approved by the Board's regional director, and which agreement expressly left open the matter of final determination of the status of the union as the bargaining representative. There is no indication of any unfair labor practice subsequent to the execution of the agreement. Nevertheless, the Government has (reneged on its approval and the company which had complied with its part of the agreement) including rehiring, posting of notices and resuming welfare and pension fund payments, (now finds itself deprived of a part of the bargain) the right to have determined the representative status of the union.

I therefore respectfully dissent and without further elaboration adopt the argument advanced in the briefs of the company and would set aside the Board's order and deny enforcement thereof.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

FOX RIVER PATTERN, INC.,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 72-1807

JUDGMENT

Before: WILBUR F. PELL, JR., *Circuit Judge*, JOHN PAUL STEVENS, *Circuit Judge*, and JOHN W. REYNOLDS, *Chief District Judge.**

THIS CAUSE came on to be heard upon a petition to review, and on a cross-application for enforcement of, an order of the National Labor Relations Board dated September 14, 1972, against Fox River Pattern, Inc., its officers, agents, successors, and assigns. The Court heard argument of respective counsel on May 31, 1973, and has considered the briefs and transcript of record filed in this cause. On August 27, 1973, the Court being fully advised in the premises, handed down its decision denying the petition for review and granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, IT IS ORDERED AND ADJUDGED by the United States Court of Appeals for the Seventh Circuit that the petition for review filed by Fox River Pattern, Inc.,

* Chief District Judge John W. Reynolds of the United States District Court for the Eastern District of Wisconsin is sitting by designation.

be and it is hereby denied; and that the said order of the National Labor Relations Board in said proceeding be enforced, and that Fox River Pattern, Inc., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that costs shall be taxed against the Petitioner.

A True Copy:

Teste:

/s/ THOMAS F. STUBBE
Clerk of the United States
Court of Appeals for the
Seventh Circuit.

by MARY ANN CROTTY,
Deputy Clerk

Judge Pell dissents.
Judge, United States Court of Appeals for the Seventh Circuit

/s/ JOHN PAUL STEVENS
Judge, United States Court of Appeals for the Seventh Circuit

/s/ JOHN W. REYNOLDS*
Judge, United States Court E. D., Wis.

* Chief District Judge John W. Reynolds of the United States District Court for the Eastern District of Wisconsin is sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 27, 1973

Before
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*
HON. JOHN W. REYNOLDS, *Chief District Judge*

FOX RIVER PATTERN, INC., *Petitioner*,
vs.
NATIONAL LABOR RELATIONS BOARD, *Respondent*.
No. 72-1807

ORDER

No judge having requested a vote on the suggestion for rehearing *en banc*, it is hereby ordered that the petition for rehearing be denied. Judge Pell voted to grant the petition for rehearing.

APPENDIX D

199 NLRB No. 12

D—6693
Chicago, Ill.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FOX RIVER PATTERN, INC.,[1] and PATTERN, MOLD AND MODEL MAKERS' ASSOCIATION OF CHICAGO AND VICINITY, AFFILIATED WITH THE PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO.	Case 13—CA-10792

DECISION AND ORDER

On May 31, 1972, Trial Examiner Arnold Ordman issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and brief and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order.

1. As amended at the hearing.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that Respondent, Fox River Pattern, Inc., Aurora, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

Dated, Washington, D. C. Sep. 14, 1972.

JOHN H. FANNING, *Member*

RALPH E. KENNEDY, *Member*

JOHN A. PENELLO, *Member*

(SEAL) National Labor Relations Board

APPENDIX E

TXD-372-72
Chicago, Ill.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Trial Examiners
Washington, D. C.

FOX RIVER PATTERN, INC.[1] and PATTERN, MOLD AND MODEL MAKERS' ASSOCIATION OF CHICAGO AND VICINITY, AFFILIATED WITH THE PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO	Case No. 13-CA-10792

Richard E. Lieberman and *David W. Adelman, Esqs.*, for the General Counsel.

Herbert M. Berman, Esq. (*Lederer, Fox and Grove*), for the Respondent.

TRIAL EXAMINER'S DECISION

Statement of the Case

ARNOLD ORDMAN, Trial Examiner: This case was heard before me on February 9, 10, and 11, 1972, based on charges filed August 2, 1971, and September 29, 1971, and on a complaint issued by General Counsel on December 30, 1971.

1. Stipulated by the parties as the correct name of the Respondent herein.

The complaint alleges that Fox River Pattern, Inc., Respondent herein, violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended, by laying off and later discharging its employee Keith Lambert, by refusing to bargain with the labor organization name in the caption, herein called the Union, and by engaging in other conduct in violation of its bargaining obligation and the statutory rights of its employees. Respondent's answer denies the commission of the alleged unfair labor practices.

Before the hearing opened and at the hearing Respondent pressed motions seeking, in effect, summary dismissal of the complaint, and/or portions thereof. The content of these motions, the facts upon which they are predicated, and their disposition will be set forth hereunder.

Upon the entire record in the case, upon observation of the witnesses, and upon consideration of the briefs filed by General Counsel and by Respondent, I make the following:

Findings and Conclusions

I. Jurisdiction

Respondent is an Illinois corporation located in Aurora, Illinois, where it manufactures patterns, castings and molds in metal and wood. Its gross revenues during the past fiscal year were in excess of $350,000, of which more than $50,000 worth was derived from goods furnished or services rendered to firms engaged in interstate commerce. Respondent admits, and I find, that Respondent is an employer engaged in commerce under Section 2(6) and (7) of the Act.

Respondent further admits, and I find, that the Union is a labor organization as defined in Section 2(5) of the Act.

II. Motions to Dismiss

A. *The Relevant Facts*

Immediately upon issuance of the complaint and thereafter, Respondent pressed motions for summary dismissal. Respondent urged, in substance, that it had complied with an earlier informal settlement agreement disposing of all the matters here in issue, that it had committed no new unfair labor practices warranting the setting aside of the settlement agreement, and that valid petitions for recertification of the Union had been filed which raised a question concerning representation and negated any further obligation on Respondent's part to bargain with the Union. The relevant facts are, briefly, as follows:

Between 1968 and 1971 Respondent and the Union were signatories to a collective bargaining agreement in which Respondent recognized the Union as exclusive bargaining representative for Respondent's "Pattern Makers and their Apprentices." [2] The agreement, which contained a union security clause, terminated as of May 1, 1971, renewable from year to year thereafter absent timely notice. Such a notice was given by letter dated February 26, 1971, from John Leonardson, business manager of the Union, to Respondent. The letter stated also:

> We have, under even date, sent similar notice to the Pattern Manufacturers' Association of Chicago and Vicinity.
>
> In the past the Independent Shop Owners have awaited the outcome of our negotiations with the Pattern Manufacturers' Association and have abided by the results of such negotiations.

2. The complaint alleges, the answer admits, and I find that, at all times material herein, all pattern makers and apprentice pattern makers employed by Respondent, excluding office clerical employees, guards, supervisors, and all other employees constitute an appropriate unit for purposes of collective bargaining. In the period under consideration here, February 1971, and thereafter, the unit consisted of approximately eight employees.

> If, however, this past practive is not acceptable to you, we shall be glad to meet with you at your earliest convenience to discuss contract changes.

Leonardson received a written reply from Respondent's legal counsel, dated April 21, 1971, advising that Respondent wished to bargain on an individual basis.

On May 10, 1971, Leonardson wrote to Respondent enclosing a number of contract proposals. On May 18, 1971, Leonardson met with Robert Johnson, Respondent's President, and his brother Bill Johnson, for a bargaining session. A long discussion, later more fully described, took place but no agreement was reached.

The May 18 meeting was the only negotiation session held between Respondent and the Union. A further meeting had been scheduled for August 10, 1971. However, on July 27, 1971, Respondent's employee, John Schmidt, filed a petition (designated in the Board's records as Case No. 13-RD-819) asking that the Union be decertified. Accordingly, Respondent and the Union agreed to postpone further bargaining negotiations pending the disposition of the decertification petition.

On August 2, six days after the filing of the decertification petition, the Union filed its initial unfair labor practice charge alleging that Respondent had violated Section 8(a)(1) and (3) of the Act of engaging in anti-union conduct *vis-a-vis* its employees and by terminating the employment of Keith Lambert. On September 29, 1971, the Union filed an amended charge alleging, additionally, a refusal to bargain in violation of Section 8(a)(5) of the Act.

No complaint issued, however, because of intervening settlement efforts. On October 20, 1971, Respondent and the Union entered into informal settlement agreement approved by the Regional Director of the Board. The settlement agreement contained a "Non-admission" clause in which Respondent denied the commission of any unfair labor practices. It further provided,

however, that Respondent would, *inter alia*, refrain from engaging in the improper conduct in which it was alleged to have engaged, that it would make Keith Lambert whole for his lost earnings, that it would make up unpaid contributions to the Union's Pension and Welfare Funds, and that it would post appropriate notices. Respondent also undertook in the settlement agreement to bargain collectively with the Union, upon request, *provided that*

> the dismissal of the petition in Case No. 13-RD-819 is either not appealed, or if appealed is sustained by the Board and no valid question concerning representation exits. . . .

In this connection the settlement agreement expressly provided that Respondent "does not admit and specifically denies that there does not presently exist a question concerning representation and that the petition in Case No. 13-RD-819 should be dismissed."

On the following day, October 21, 1971, the Regional Director dismissed the petition in Case No. 13-RD-819, as contemplated by the settlement agreement. On October 29, 1971, the dismissal was appealed to the Board and Respondent filed a brief in support of the appeal. For reasons not appearing, the Board did not rule on the appeal. Instead, it remanded the matter to the Regional Director "for further appropriate action, to wit, either process the instant petition or proceed to a definitive disposition of the refusal to bargain charge in 13-CA-10792 [the instant unfair labor practice case]." While the appeal was still pending before the Board and before the remand, Respondent fulfilled its obligation under the settlement agreement to make Keith Lambert whole for lost earnings, to make up its unpaid contributions to the Pension and Welfare Fund, and to post notices. Because there had been no final action taken with respect to the decertification petition as provided in the settlement agreement, no bargaining negotiations were instituted.

Acting pursuant to the Board's remand, the Regional Director, on December 30, 1971, withdrew his approval of the settle-

ment agreement and issued the complaint in the instant case. On January 7, 1972, a second petition to decertify the Union was filed in Case No. 13-RD-833. On January 21, 1972, Respondent filed its motion, already described, to dismiss the complaint, and thereafter filed its answer to the complaint. On January 26, 1972, the Regional Director dismissed the petition in Case No. 13-RD-833 and also the petition in Case No. 13-RD-819 which he had previously dismissed. On February 2, 1972, these dismissals were in turn appealed to the Board. On the morning of February 9, 1972, a few hours before the instant hearing opened, the Board ruled on the appeals and sustained the Regional Director's dismissals.[3]

At the instant hearing the Union reiterated its continuing desire to bargain with Respondent. Respondent took the position it no longer had any obligation to bargain.

The foregoing facts are undisputed.

B. Analysis and Disposition of Respondent's Motions to Dismiss

As already noted, Respondent's motion to dismiss the instant proceeding has several facets. Respondent's primary contention is that the issues presented in the instant complaint were resolved by the settlement agreement of October 20, 1971, that Respondent complied fully with the terms of that settlement agreement prior to its revocation by the Regional Director, and that it has committed no new unfair labor practices—indeed, no new unfair labor practices are even alleged. Accordingly, Respondent argues that the Regional Director was precluded, under well-established principles, from setting aside the settlement

3. Under the explicit terms of the October 20 settlement agreement, Respondent's obligation to bargain with the Union, upon request, would have been activated by the Board's ruling of February 9 sustaining the dismissals. However, as noted, the Regional Director had withdrawn his approval of the settlement agreement on December 30, 1971.

agreement and that further proceedings herein are barred. Respondent cites cases in support of the principle that absent new and independent unfair labor practices, "a duly executed settlement agreement must be honored, if the Board's settlement procedures have any meaning, unless the respondent's conduct demonstrates that the agreement has failed of its purpose." *Jackson Manufacturing Company*, 129 NLRB 460, 462 (1960). Accord: *United Dairy Co.*, 146 NLRB 187, 189 (1964). And see *N. L. R. B.* v. *Tennessee Packers, Inc.*, 390 F. 2d 787 (C. A. 6, 1968).

General Counsel, on the other hand, argues that a settlement agreement does not constitute a bar to an unfair labor practice proceeding on the same matter. In support of this proposition, General Counsel cites *N. L. R. B.* v. *Lake Superior Lumber Co.*, 167 F. 2d 147 (C. A. 6, 1948), where the Court said (at p. 150):

> . . . Section 10(a) of the Act . . . provides that the Board shall have exclusive power to prevent any person from engaging in any unfair labor practice, which power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." Although settlement agreements approved by the Board should be and usually are respected by it as a matter of policy yet the Board is not barred or estopped thereby as a matter of law from later proceeding under the Act. *Wallace Corp.* v. *N. L. R. B.*, 323 U. S. 248, 254. . . .

Accord: *N. L. R. B.* v. *Zimnox Coal Company*, 336 F. 2d 516, 517 (C. A. 6, 1964).

The respective authorities cited by the parties are not antithetical. There is no absolute bar to setting aside a settlement agreement and processing unfair labor practice charges in the same matter. Yet, it is equally true that the Board "as a matter of policy" has respected settlement agreements. The line of demarcation is plain. The design and the desirability of a

settlement agreement is to lay disputed matters to rest. In a labor relations context, it is to restore, as effectively and expeditously as possible, the labor peace which it is the purpose of the Act to achieve. Where the settlement agreement achieves this end, it would be a disservice to the parties involved and to the policies of the Act to set aside a settlement agreement and resuscitate a dispute which has already been laid to rest. But this is true only where the dispute has been effectively laid to rest. Where, because of new and independent unfair labor practices, or for other reasons, the settlement agreement "has failed of its purpose" (*Jackson Manufacturing Company, supra*), there is no estoppel to further Board proceedings. *Wallace Corporation* v. *N. L. R. B.*, 323 U. S. 248, 254 (1944).[4]

In my view the settlement agreement here has failed of its purpose. The unfair labor practice charges upon which the settlement was predicated alleged, *inter alia*, that Respondent had discriminatorily discharged an employee, had unlawfully withheld payments to a Pension and Welfare Fund, and by this and other conduct, had refused to bargain with the Union. Apart from the "non-admission" clause, Respondent did undertake in the settlement agreement to make the discharged employee whole and to make restitution to the Pension and Welfare fund, undertakings which the Respondent, as already noted, fulfilled. But on the critical issue of Respondent's alleged refusal to bargain, the agreement, for reasons beyond the control of the

4. We may put to one side for purposes of the case General Counsel's suggestion that the Board would not be estopped in any event because in the instant case, unlike others relied upon, the Board never put its own imprimatur on the settlement agreement. As noted, no complaint had yet issued. Board jurisdiction did not attach, and the power to approve or disapprove the settlement lay solely, under the statutory separation of powers, with the Regional Director and the General Counsel, as indeed, the face of the settlement agreement indicates. On the other hand, under the same separation of powers the General Counsel cannot in the circumstances here presented mandate the Board to assert its jurisdiction without regard to the settlement agreement. That choice is for the Board.

parties, was not and could not be consummated. As already stated, Respondent conditioned its willingness to bargain upon final dismissal of the pending decertification petition. The face of the settlement agreement contemplated the dismissal of the decertification petition or, alternatively, the processing of that petition. If the Board, on appeal, sustained the Regional Director's dismissal of the petition, Respondent would have been obligated to bargain under the terms of the settlement agreement. If the Board, on the other hand, reversed the Regional Director, the decertification petition would have been processed and the question concerning representation duly resolved. The Board did neither and, instead, remanded the matter to Regional Director. Fault is not, and cannot on the basis of this record, be assigned in this regard. But the fact remains that the Board's action left the critical question concerning representation which lay at the heart of this controversy unresolved and, to that extent, frustrated the scheme of the settlement agreement. For the Board to abstain in these circumstances from asserting its jurisdiction to resolve the continuing controversy would be to compound and prolong the controversy which the settlement agreement was designed to resolve but for reasons beyond the control of the parties failed to resolve.

Under all these circumstances I conclude and find that the settlement agreement, to the extent the question concerning representation was not resolved, failed of its purpose, was properly set aside, and does not constitute a bar to the present proceeding.

Respondent argues further that in any event it was relieved of its duty to bargain because of the pendency of the decertification petition in Case No. 13-RD-819 and the later petition in Case No. 13-RD-833. In essence, it is Respondent's position that in the absence of unremedied unfair labor practices an employer cannot be required to bargain with a union, even an established union, in the face of a decertification petition (Re-

spondent's Memorandum In Support of Motion To Dismiss Complaint, p. 6, *et seq.*). As a proposition of law, the statement is not wholly accurate. The Board, quite recently, had occasion to reaffirm the principle that the "mere filing of a decertification petition does not provide sufficient grounds for doubting an incumbent union's representative status, since such a petition need only be supported by 30 percent of the employees in a bargaining unit." *GAF Corporation*, 195 NLRB No. 11, sl. op., p. 4; 79 L. R. R. M. 1241 (1972).[5] Moreover, Respondent's contention is also vulnerable on its face since it is correctly premised on the absence of "unremedied unfair labor practices" and cases are legion that the filing of a decertification petition will not serve as exoneration for an antecedent wrongful refusal to bargain. See, e.g. *N. L. R. B.* v. *Gissel Packing Company*, 395 U. S. 575, 600 (1969); *Windemuller Electric, Inc.*, 180 NLRB 686, n. 1 (1970).

This was precisely the situation here. The Regional Director, pursuant to the Board's remand, was required to determine whether to process the decertification petition or proceed to complaint in the unfair labor practice proceeding. Prerequisite to that determination was a decision as to whether the decertification petition presented a question concerning representation which could best be resolved by an election, or whether that route was foreclosed because Respondent had engaged in prior unfair labor practices including a refusal to bargain, as stated in the Union's unfair labor practice charge. Pursuant to the investigatory and prosecutory responsibilities under Section 3(d) of the Act, the Regional Director found merit in the unfair labor practice allegations of the charge and issued a complaint. Implicit in this determination was the conclusion that no question concerning representation existed and, accordingly, the

5: The Board added the comment that "a petition filed by an uncoerced majority of the unit employees may establish such a basis," but Respondent does not urge that such a situation existed here.

Regional Director dismissed the decertification petitions,[6] a dismissal which, this time, the Board on appeal sustained.

It follows, and I find, that the decertification petitions filed herein do not bar the instant unfair labor practice proceeding.[7] Needless to add, the Regional Director's determination is not binding upon the Board as to whether the alleged unfair labor practices actually occurred. That will be finally determined on the basis of the record in this proceeding.

In addition to seeking summary dismissal of the entire complaint, Respondent asked separately for dismissal of the Section 8(a)(1) and (3) allegations of the complaint on the ground that the actions alleged in that regard had been fully remedied by the settlement agreement and the payments made and other action taken by Respondent in compliance with that agreement. The short answer to this otherwise appealing position is that these allegations are essential components of the refusal to bargain portion of the complaint (see paragraph VI); and Respondent in the settlement agreement itself, in its answer to the complaint, and at the hearing denied that it had engaged in the alleged unlawful conduct. In view of Respondent's position, to grant the motion to dismiss the Section 8(a)(1) and (3) allegations of the complaint would be to deny General Counsel his right and opportunity to litigate fully the refusal to bargain allegation. Respondent's request must be, and is hereby, denied.[8]

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6. It is noteworthy that the Regional Director in this instance reached the same conclusion which he had reached when he had initially dismissed the petition in Case No. 13-RD-819.

7. Respondent can draw no comfort from the Trial Examiner's decision in *Telautograph Corporation*, Case No. 29-CA-2180. In that case, unlike the instant case, the Regional Director determined, after hearing, that a question concerning representation did exist and the record was also devoid of any allegations of unremedied employer unfair labor practices.

8. Respondent, upon denial of the foregoing motions, asked for restitution of the funds it had already paid out pursuant to the settlement agreement. In part, the prejudice to Respondent flows

III. The Alleged Unfair Labor Practices

The evidence relating to the unfair labor practices alleged in the complaint derives largely from the testimony of three witnesses: Keith Lambert, an employee who was alleged to have been discriminatorily laid off and later discharged, Robert K. Johnson, president of Respondent, and John Leonardson, business agent for the Union. Their testimony, with occasional reference as relevant to other evidence of record, is summarized hereunder.

A. *The Testimony of Keith Lambert*

Keith Lambert, a metal pattern maker, had been employed by Respondent for about 13 years. He was an active member of the Union and on May 3, 1971, became chairman of the Union's Aurora branch, following the resignation of Donel L. Hale, a fellow-employee, from that post.

Lambert testified on direct examination for General Counsel that in early March 1971 Respondent's President Robert L. Johnson, told him that Respondent had received a contract renewal notice from the Union and that Johnson did not intend to run a union shop if he could help it. In another conversation on or about March 24, 1971, Johnson told Lambert that business conditions were quite rough, work was hard to come by, and if the employees would quit the Union, "both the shop and the union could earn more money, be better off." In a

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from its own election to enter into a settlement without litigating the issue of liability, which it denies, and in part it flows from Respondent's otherwise commendable effort to make the payments in question before the final disposition of the decertification petition which was pivotal to the consummation of the settlement agreement. In any event, even assuming some prejudice to Respondent, the funds in question have been paid over to Keith Lambert and to the Pension Fund and this tribunal is without authority to direct restitution. However, this ruling is without prejudice to the rights, if any, which may accrue to Respondent to obtain restitution before an appropriate tribunal. Compare *N. L. R. B.* v. *Sprewak, et al.*, 179 F. 2d 695, 698 (C. A. 3, 1950).

similar conversation a few weeks later, Johnson stated to Lambert that he no longer wanted to run a union shop, and if he were forced to sign a union contract, he would almost be forced to run out of work for the union help.

In an interchange between Johnson and Lambert on or about April 15, the conversation, according to Lambert, took a different tack. Johnson said that he had offered to sell Donel Hale 10 percent of the company stock and that, contingent on the approval of his brother, Bill Johnson, who was away on vacation, Lambert would be afforded the same opportunity. Both offers were conditioned, however, on the offerees' withdrawal from the Union.[9]

On or about May 1, 1971, Johnson told Lambert that the contract with the Union expired May 1, that Respondent had discontinued its payments to the Union's Welfare and Pension Fund, and that Respondent was prepared to set up its own program when and if the employees quit the Union.[10]

On May 5, 1971, two days after a Union meeting at which Donel Hale resigned his chairmanship of the Aurora branch and Lambert succeeded to that post, Lambert was laid off.

9. Donel Hale testified under subpena that Respondent had made several offers to sell him company stock; that he accepted the most recent offer in May 1971 and was making payments on a 10 percent stock interest; that at the time he was a member of the Union and chairman of its Aurora branch; and that, upon accepting the offer, he resigned from the chairmanship and dropped his Union membership. Hale initially denied emphatically that Johnson had conditioned the stock offer on his resignation from the Union. Hale was then confronted with an affidavit he had executed on September 9, 1971, five months earlier. In the affidavit Hale stated, "Johnson did not tell me I would have to drop out of the union if I bought the stock in the company. He might have said I couldn't be a member of management and the union at the same time." When recalled as a witness for Respondent, Hale's last word on this subject was that he could not really "swear" whether Johnson did or did not tell him to drop out of the Union.

10. The parties stipulated that Respondent discontinued the payments in question beginning May 11, 1971, and ending October 11, 1971. As already noted, Respondent made restitution for these missed payments pursuant to the October 20 settlement agreement.

Lambert testified that he had come to the plant office to get another assignment, having finished the job he was working on—this was customary procedure; that Johnson told him there was no more work for him at that time; and that he would be laid off until work became available at which time he would be called back. Lambert was the only employee laid off and at the time was senior in years of service to all the other employees.

Lambert returned to work on May 24 pursuant to Respondent's call several days earlier asking him to return. A few days later, according to Lambert, Johnson told him that part of the reason was to teach him what it was like to be out of work, that Lambert was the most pro-union man in the shop and the hardest to convince to drop out of the Union. There was also an interchange at this time relating to the fact that Lambert had elected to take unemployment compensation for the period of his layoff rather than use his vacation time for that purpose.

The next event of importance, according to Lambert, was a meeting in Johnson's office on June 4, 1971, immediately after working hours. This meeting, which followed by about two weeks the negotiating session of May 18 between Johnson and Leonardson, was attended by Robert Johnson and his brother Bill Johnson, and by several of the employees including Lambert. As Lambert related the sequence of events at the meeting, Robert Johnson did virtually all the talking for management. He asked each employee present what he thought he was worth and why. Some of the men replied. Johnson noted that the metal workers were easy to replace and were probably getting too much money. Then Johnson outlined the terms of employment he felt he could give the employees if and when they dropped the Union. These included a 35-cent an hour increase rather than the 60-cent increase the Union was asking; a two-week vacation instead of a three-week vacation; holiday pay to be paid as the holidays occurred rather than quarterly; and certain improvements in the employees' insurance coverage. Johnson then asked each employee individually whether he

would accept the proposal. Some of the employees responded affirmatively but Lambert asked for time to make his decision. In response to a question whether Respondent would sign a contract, Johnson replied that if the employees dropped the Union, a contract was not needed.

During the next few weeks Johnson, according to Lambert, pressed Lambert for his decision on the June 4 proposal, indicating on one occasion that the delay was prejudicial to the employees in the matter of insurance coverage and pension payments. The last such incident occurred on June 16, 1971, when Lambert came to the office for a new job assignment. Johnson again asked Lambert whether Lambert would accept Johnson's June 4 proposal. Lambert replied that he had decided not to quit the Union. Johnson then told Lambert that Lambert might as well pick up his tools and leave. Lambert did.

Lambert was extensively cross-examined. He acknowledged that in his affidavit furnished to a Board investigator on August 9, 1971 relating to the events under consideration here, there was no reference to the two conversations with Johnson in March of 1971, already set forth herein, and also no reference to Johnson's statement on or about May 1 that Respondent would set up its own welfare and pension program if the employees quit the Union. Lambert also acknowledged that when Johnson offered to sell him company stock, Johnson did mention that Respondent had for years been contemplating a method for perpetuating the business by bringing employees into an ownership status by selling them a stock interest.

Lambert also testified on cross-examination that at the time of his May 5 layoff there was little, if any, metal work available in the shop. With reference to the June 4 meeting between Johnson and the employees, Lambert testified that Johnson, in addition to outlining his proposals to the employees, also discussed economic conditions in the industry, and further testified that Johnson might have outlined the proposals and counterproposals made at the May 18 negotiation session with Leonardson.

B. *The Testimony of Robert Johnson*

Robert Johnson's testimony, summarized hereunder, is in several respects in conflict with the testimony of Keith Lambert. Asked whether he had ever made a statement to Lambert that if the employees left the Union, things would be better, Johnson replied, "No, I don't think I ever made that statement." Johnson also testified that he could not recall telling Lambert at any time that he no longer wanted to run the plant with a Union contract. On the other hand, on cross-examination by General Counsel, Johnson testified that he had told Lambert at one time that "I wished to hell they'd drop out of the Union and get this thing over with."

Johnson confirmed that he had offered Lambert a 10 percent interest in the company stock subject to his brother's approval, but denied that the offer was conditioned on Lambert's withdrawal from the Union. According to Johnson, the sole motivation for the offer was Respondent's desire to insure perpetuation of the business by bringing employees into an ownership capacity. Johnson testified that he selected Lambert because "he is a very good worker, very conscientious worker, very efficient worker." Johnson said the same considerations motivated a stock offer to employee Hale and an earlier offer to Aldridge. Employee Wickman also was given a stock offer.[11]

With respect to his June 4 meeting with the employees, Johnson explained that such meetings were unusual. According to Johnson, a Union meeting had been held before June 4 among the employees and Johnson had inquired of employees "what the heck had happened" there. Johnson testified that he was told the employees knew nothing of Respondent's proposals, that they were told merely that Johnson "likes to gripe" and would eventually sign the Union contract. Johnson stated that he responded

11. Aldridge, a supervisor withdrew from the Union when he purchased his stock. Employee Hale, as already noted, resigned from the chairmanship of the Union's Aurora branch and dropped his Union membership.

to the employees that he had no chance of negotiating, that the Union would make him sign the contract or else, and that he further told the employees, "I don't know why the hell you just don't drop out and get it over with." According to Johnson, several of the employees then asked for a meeting with Johnson to find out what was going on in the bargaining negotiations between Respondent and the Union and Johnson scheduled the meeting of June 4.

Johnson's account of the June 4 meeting was not too different from that given by Lambert. Johnson stressed, he testified, Respondent's right to sign or not to sign a contract and the employees' right to communicate their views to the Union. Johnson confirmed that he had discussed wages at the meeting and that he had asked the employees individually what each wanted in wages and what each thought he was worth. Johnson denied having said that metal pattern makers could be easily replaced but admitted having said that the type of work the metal pattern makers were actually doing could be performed by tool and die makers or machinists at a much lower rate of pay. Johnson corroborated Lambert's testimony that he, Johnson, had discussed Respondent's proposal concerning holiday pay, and modifications in the insurance plan, and in the welfare and pension schemes. Johnson also admitted talking to the employees about what he was prepared to offer them if there were no union. Specifically, Johnson testified:

> I didn't offer anything to the men. When they asked me what I would do if I didn't have a union or if the union won't give us a contract, whatever the whys and wherefores were, I told the men I can't discuss the details of what they would get. *All I could do was give them something comparable which everyone would be satisfied with.* [Emphasis supplied.]

With respect to Lambert's layoff and subsequent termination Johnson said the May 5 layoff was for lack of work. Johnson denied later telling Lambert that the layoff was to teach Lambert a lesson because he was the most pro-Union man in the shop. Johnson said he merely noted his unhappiness that Lambert had put in a claim for unemployment compensation rather than utilize his vacation time as Johnson had suggested. Johnson confirmed that he had recalled Lambert to work after the May 5 layoff, and that during this period he had several conversations with Lambert relating to whether Lambert would quit his job to go into the contracting business with a friend. On June 16, according to Johnson, Lambert came into the office for another job assignment and Johnson stated that no work was available. In the ensuing conversation, Johnson testified, Lambert said he had a job lined up with his friend and could go to work anytime. Johnson then responded, "Well, as long as there isn't anything to do here, now would be as good a time as any to leave."[12] Johnson denied asking Lambert at this or any other time whether Lambert had decided to quit the Union.[13]

12. Lambert, recalled as a rebuttal witness, agreed that he had had a discussion with Johnson on June 16 about lining up a new job. But Lambert testified that this discussion was after Johnson had told him to pick up his tools and leave. According to Lambert, he told Johnson that he had arranged to work for his contractor friend when work was available. In fact, Lambert did work for his friend in June and July on a part-time basis at $4.00 per hour compared with the $6.90 hourly rate Respondent was paying him. Some time thereafter Lambert returned to Respondent's employ. On September 3, 1971, however, Lambert voluntarily quit.

13. Donel Hale testified that he saw Lambert picking up his tools on the day in question, and that in response to his inquiry Lambert stated he had quit; that there was no more work to be done; that this was just a good a time as any; and that he had something lined up to build houses for a fellow.

C. *The Testimony Concerning the May 18, 1971 Bargaining Meeting*

John Leonardson, Union business agent, and Robert Johnson were the respective protagonists for the Union and Respondent at the May 18 meeting, the only bargaining session held between the parties. The only other person present was Robert Johnson's brother, Bill Johnson, who participated minimally and was not called to testify.

Respondent had already been furnished with a copy of the Union's contract proposals when Leonardson called Robert Johnson to arrange the bargaining meeting. According to Leonardson, Johnson initially expressed some reluctance to meet, indicating that he had decided to follow a different route, but finally Johnson acceded to Leonardson's request for a face-to-face meeting.

The meeting was held at 3 in the afternoon in Johnson's office. Leonardson testified that before the parties were even seated Johnson indicated that he was really not interested in talking about a new contract because he was not about to sign a new contract. Johnson further stated, according to Leonardson, "I want to get you fellows the hell out of here. I don't mean you, I mean the union." Johnson explained that Respondent had for some time been considering running the business as an owner-operated shop without any employees. Johnson further stated, according to Leonardson, that business was not good, that the Union proposals which he had received were going to be too costly, and that the owner-operated business Respondent was contemplating would be more economical. While initially reluctant to discuss specific proposals, Leonardson testified, Johnson did at Leonardson's insistence discuss wages and other conditions such as vacations, paid holidays and welfare provisions including insurance and pension fund proposals. Essentially, Johnson's position with respect to these several items, according to Leonardson, was that the Union proposals were either too

costly or, as in the case of holidays and vacations, not adapted to the needs of Respondent's business. With respect to welfare provisions, hospitalization, sick benefits, life insurance and pension provisions, Johnson suggested that on the basis of his talks with experts he could himself duplicate exactly what the Union contract provided. Leonardson testified that he presented counter-arguments to Johnson's presentations. But it was apparent that the parties were not in agreement at this meeting and Leonardson so noted. Johnson agreed.

Because the hour was late, Leonardson prepared to leave. Leonardson testified that he made a comment to the effect, "I'll be seeing you" and Johnson replied, "I don't know what for." According to Leonardson, he "jokingly" said to Johnson, "You mean, you would throw me out if I come back?" Johnson replied, "Oh, no, not that."

Johnson's version of the meeting of May 18 differed in some particulars from Leonardson's version. Johnson indicated, contrary to Leonardson, that he wanted to meet with Leonardson and that he wanted to negotiate his own contract. Johnson confirmed that he and Leonardson had discussed all the points Johnson was "at odds with." According to Johnson, Leonardson was in sympathy with Respondent but stated that he could do nothing about it, that his job was to submit what the employees wanted, but that he and Johnson would work out a contract. Johnson testified that at the conclusion of the meeting he said "in a joking fashion" to Leonardson, "It looks to me like the only [sic] I get what I want is to get rid of you."

Johnson denied stating to Leonardson that he had no intention of signing a Union contract or that his sole intention was to get the Union out.

D. *Analysis and Disposition of the Evidentiary Issues*

As the foregoing summary of the evidence reveals, there are testimonial conflicts in several areas. This is hardly surprising inasmuch as we are dealing here with numerous conversations between Lambert and Johnson extending over a period of several months and with two long meetings, one, the May 18 bargaining session between Leonardson and Johnson, and the other, the June 4 meeting between Johnson and the employees. I believe the three critical witnesses Lambert, Johnson and Leonardson, were on the whole making a commendable effort, notwithstanding a natural self-interest, to narrate faithfully their recollections as to these matters. That their recollections vary somewhat is not surprising. What is significant, however, is that the testimonial differences are often more semantic than real, more a matter of emphasis than substantive content.

It would serve no useful purpose, in my view, to resolve the testimonial differences as to each of the many conversations between Johnson and Lambert. Lambert recalled that Johnson had emphasized his adamant opposition to entering into a Union contract, his conviction that if the employees quit the Union, they would be better off, and that if Respondent were forced to sign a contract, work would "run out" for the Union employees. Johnson denied or could not recall making the statements attributed to him. On the other hand, Johnson did recall telling Lambert at one time that "I wish to hell they'd drop out of the Union and get this thing over with." Johnson admittedly used almost the same language when, as he testified, he talked to his employees before the June 4 meeting. His words then were, "I don't know why the hell you just don't drop out of the Union and get it over with." In the light of all this testimony, including Johnson's own admission, I am satisfied, and I find that, whatever the precise words used, Johnson made clear to Lambert, and indeed to other employees, that he did not want the Union, that the employees should drop the Union, that they

would be prejudiced if they remained with the Union and would be better off without it.

This finding is reinforced when we consider the stock offers. I credit Johnson's testimony that he had for some years contemplated a changeover in Respondent's operations to make it an owner-operated business and that a few years earlier he had sold a 10 percent interest in the business to Aldridge, a supervisor in Respondent's employ. I am satisfied, however, that this idea had become dormant and that Johnson suddenly seized upon and revived it in order to frustrate the Union's effort to obtain a new collective bargaining agreement. The timing of the offers could not have been wholly coincidental especially in view of Johnson's admitted and contemporaneous assertions that he saw an "owner-operated" business as an alternative to a union contract.

Lambert testified that the stock offers to him and to Hale were conditioned on their dropping out of the Union. Hale could not recall and vacillated as to whether Johnson did or did not tell him that stock ownership and Union membership were incompatible. Wickman did not testify. Johnson denied that he had conditioned the stock offers. Yet it is clear that Aldridge had dropped his membership, that Hale did so also, and that the tentative stock offer to Lambert who refused to drop his membership never matured. On the whole record I am satisfied, and I find, that explicit or implicit in Johnson's stock offers was the requirement that the offerees drop their Union membership.

It is in this context also that the bargaining session of May 18 between Leonardson and Johnson must be appraised. As already noted, Johnson testified that he told Leonardson he wanted to meet to negotiate his own contract and that he discussed all the points in the Union's proposal with which he was at odds. According to Johnson, Leonardson was sympathetic but insisted on the Union's proposals. On the other hand, on Johnson's own version Leonardson said that they could work

out their contract problems. Nevertheless, at the end of the meeting Johnson admittedly told Leonardson that it looked like the only way Johnson could get what he wanted is "to get rid of you." Asked by his counsel whether this was said "in a joking fashion," Johnson replied, "Yes, I would say so."

Leonardson testified, however, that Johnson was initially reluctant to meet at all, that Johnson's remark about getting the Union out was made at the outset of the meeting, that he was not about to sign a new contract and that he had for some time been contemplating running the plant as an owner-operated shop without any employees. According to Leonardson, at the end of the meeting in which proposals and counter-proposals were discussed, Leonardson prepared to take his leave with the comment that he would see Johnson again and Johnson responded, "I don't know what for."

Appraising this testimony against the background of record including Johnson's repeated statements about getting rid of the Union and his efforts by stock offers to enlist the support of Lambert, Hale, and Wickman, I find that Johnson's participation in the meeting of May 18 did not meet the standards of good faith bargaining. I find that Johnson in effect rejected Leonardson's suggestion, which Johnson acknowledged, that they could work out a contract, and that Johnson's bargaining position was really fixed by his position expressed either at the beginning of the meeting according to Leonardson or at the end of the meeting according to Johnson that the answer to Respondent's problem lay in getting rid of the Union. The record establishes in my view that Johnson did not enter into, or conduct the negotiations at, the meeting of May 18 with the intention of reaching an agreement.

This conclusion is fortified by a review of Respondent's conduct after the May 18 meeting. Within a few weeks thereafter Johnson admittedly inquired of employees "what the heck had happened" at a Union meeting. He testified further that he was told the employees had not been informed of Respondent's

proposals. It was at this point, Johnson said, that he told the employees they ought to drop out of the Union and get it over with. Johnson then scheduled the meeting of June 4 with the employees, an unusual practice, as he acknowledged, which came about because, he said, the employees asked for such a meeting. On the basis of Johnson's own testimony and even without regard to Lambert's testimony already summarized, it appears that Johnson discussed with the employees the Union's proposals and his counter-proposals. Johnson also admitted asking the employees individually—no Union representative was present—what each employee wanted in wages and what each thought he was worth. Johnson denied stating to the employees that metal pattern makers could be easily replaced but admitted saying that the type of work the metal pattern workers were doing could be performed by tool and die makers or machinists at a lower rate of pay. Finally, Johnson vouchsafed that he had told the employees in general terms what he was prepared to offer them in the way of terms and conditions of employment absent the Union. Johnson sought to justify this conduct on the basis that the employees had asked him for this information.

It is apparent, therefore, and I find, on the basis of Johnson's own testimony and without regard to Lambert's testimony which was even stronger, that Johnson on June 4 engaged in individual bargaining with the employees without the presence of the Union as their designated representative, and otherwise pressured the employees to dissuade them from their Union affiliation.

Remaining for consideration is the evidence relating to the layoff of Keith Lambert on May 5, 1971, and his subsequent discharge on June 16, 1971. Lambert's May 5 layoff came about when he finished the job he was working on and he reported to Johnson for another assignment. Johnson told Lambert there was no other job available and Lambert was laid off. Lambert was recalled a few weeks later and reported back on May 24.

The record is clear that this was a very slow period in Respondent's business and Lambert's own testimony indicates that there was little, if any, metal pattern work available on May 5. It appears, also, however, that Keith Lambert was the most senior of the employees in Respondent's employ, that layoffs were unusual, and that Johnson regarded Lambert as a highly competent workman. These circumstances are not wholly dispositive of the issue. Lambert's basic expertise was on his own admission as a metal pattern worker, most of that work was done by Lambert and one other employee, Franz Lais, and at the time of the May 5 layoff Lais was already working on the only metal pattern job left in the shop. So far as appears, Respondent did not apply a rule of seniority with respect to layoffs.

Significant evidence in this regard, however, flows from Lambert's testimony that on or about May 28, a few days after his return to work, Johnson told him that part of the reason for the May 5 layoff was to teach Lambert what it was like to be out of work, that Lambert was the most pro-union man in the shop and the hardest to convince to get out of the Union.

Johnson denied making these statements and said that the only subject matter discussed at the time was Johnson's disappointment that Lambert had elected to collect unemployment compensation for the period of his layoff rather than use his vacation time for that period. Lambert also recalled discussing this matter with Johnson.

In view of Johnson's other conduct and statements, I have no question that Johnson was aware of Lambert's strong Union attachments and that he was disappointed that Lambert—and for that matter all the other employees—did not drop out of the Union. I am also persuaded that because of this attitude Johnson may well have expressed sentiments akin to those Lambert ascribed to him. Yet I am satisfied that the real reason for the May 5 layoff was the lack of work. Johnson did not make reference to Lambert's Union sympathies at the

time of the layoff. On the contrary, he told Lambert at the time, as Lambert testified, that he would call Lambert back when work became available and, in fact, did so. I find a lack of probative evidence to establish that the May 5 layoff was discriminatorily motivated.

The June 16 discharge was of a different character. Essentially, it arose from a similar situation. Lambert had again run out of work and asked for a new assignment. So far as appears, again no work was available. However, the situation in certain respects was markedly dissimilar from the May 5 situation. As of June 16, the May 18 bargaining session had already been held as had the June 4 meeting between the employees. Johnson had plainly expressed to Lambert and other employees that they drop out of the Union and "get this thing" over with. Donel Hale and Wickman had already accepted stock offers, and Hale, at least, had withdrawn from the Union. Lambert, on the other hand, was still tenaciously resisting.

According to Leonardson, Johnson on June 16 pressed his inquiry as to whether Lambert would quit the Union. Lambert said he would not and Johnson thereupon told Lambert that he might as well pick up his tools and leave. Johnson's version of the conversation differed. He testified that he told Lambert there was no work available, that Lambert said he had a job lined up with a friend and could go to work anytime whereupon Johnson responded, "Well, as long as there isn't anything to do here, now would be as good a time as any to leave." Lambert confirmed that he had talked with Johnson on June 16 about lining up a new job, but said that this subject came up after he was told to pick up his tools and leave, that Johnson then asked him whether he would have anything to do, and he replied that he had arranged with a contractor friend to work for him when work was available.

In fact, Lambert did so [sic] some work on a part-time basis for his contractor friend during June and July. His hourly rate

of pay was $4 as compared to the $6.90 hourly rate Respondent paid him. Some time thereafter at a date not disclosed by this record, Lambert returned to Respondent's employ and worked until September when he voluntarily quit.

I find Lambert's account of the June 16 conversation credible. I believe that work for Lambert was unavailable on June 16. On the other hand, I find it implausible that, as Johnson's testimony suggests, Lambert in effect quit because he had another job lined up. Lambert would hardly have given up a $6.90 per hour job for part-time work at $4 per hour. On the other hand, it is wholly plausible that, having been discharged, he would have told Johnson, upon the latter's inquiry that he had lined up some work with his contractor friend when such work was available. For Lambert to make such an arrangement was wholly reasonable in view of the fact that work at Respondent's plant was short and layoffs were likely. I find that the conversation of June 16 took place as Lambert testified.

Moreover, it is significant that Johnson did not on June 16, as he had on May 5, merely lay off Lambert until work became available again. Certainly, this would have been the reasonable course to follow for an employee whom Johnson described as "a very good worker, very conscientious worker, very efficient worker." A fair inference, and the inference I draw, is that Johnson rejected this approach and chose the alternative of discharge because Lambert stubbornly resisted Johnson's obvious and manifested desire that Lambert quit the Union. I so find.[14]

14. Militating against this conclusion is the testimony of Hale who was called as a witness for Respondent shortly before the close of the hearing. Hale's role in the instant controversy between Respondent and the Union has already been described. As already noted, Hale testified that he saw Lambert picking up his tools on June 16, that Lambert said he had quit, that there was no more work to be done and this was as good a time as any. Lambert added, according to Hale, that he had something lined up to build houses for a fellow. The only significance of Hale's testimony rests

E. *Concluding Findings on the Alleged Unfair Labor Practices.*

1. Paragraphs V, VII, and VIII of the complaint allege that Respondent laid off Keith Lambert on May 5, 1971, and terminated his employment on June 16, 1971, for refusing to drop out of the Union, thereby violating Section 8(a)(1) and (3) of the Act. For reasons already stated, I find that the preponderance of the evidence on the whole record warrants a finding of unlawful interference and discrimination within the meaning of those statutory provisions with respect to the June 16 termination. I find further that the preponderance of the evidence does not support such a finding with respect to the May 5 temporary layoff.

2. Paragraphs VI, VII, and IX of the complaint allege that Respondent refused to bargain collectively with the Union in violation of Section 8(a)(1) and (5) of the Act. This allegation is predicated on a pattern of conduct by Respondent including direct negotiation with the employees by the offer of stock and other benefits; by the discriminatory layoff and termination of Keith Lambert; by threats of layoff if the employees did not drop out of the Union and a Union contract resulted; by the unilateral discontinuance of payments to the pension and welfare funds; and by the refusal to bargain in good faith at the negotiating session on May 18, 1971.

I find that the Section 8(a)(5) and (1) allegations of the complaint are sustained on this record. Preliminarily, it should be noted that the existence of an appropriate unit of pattern makers and apprentice pattern makers employed by Respondent and consisting of about eight employees is disputed. It is likewise undisputed that as of May 1, 1971, the termination date of

in the fidelity of his recollection that Lambert said he had "quit." Hale was not present at the conversation between Johnson and Lambert. Under these circumstances and for reasons already stated, I find Hale's recollection in this regard of insufficient probative value to overcome the findings heretofore made.

the union security agreement between Respondent and the Union, the Union was the majority representative of the employees in that unit. On familiar principles and absent objective evidence of a change, the continued existence of that majority is presumed and Respondent's obligation to bargain continues. Respondent does not really quarrel with this principle, but it does argue that both the presumption of continuing majority and the continuing obligation to bargain were dissipated when Employee Schmidt filed his decertification petition on July 27, 1971. For the reasons and under the authorities already set forth, this contention does not aid Respondent. Apart from the fact that the mere filing of a naked decertification petition does not establish a majority, the petition in issue was not filed until July 27, long after the unfair labor practices here found occurred, and any loss of majority which might have occurred thereafter is attributable to these unfair labor practices.[15]

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15. In its answer to the complaint, Respondent pleaded not only the petitions for decertification (the second petition for decertification was filed on January 7, 1972) but also the existence of "other objective evidence" of loss of majority. Respondent proffered no such "objective evidence" during the course of the three-day hearing. However, after both General Counsel and Respondent had rested their respective cases and just before the formal closing, Respondent requested permission to reopen the evidentiary portion of the hearing to recall a witness for a single question in this regard. Permission was denied but an offer of proof was invited. The offer of proof reads:

> If Mr. Johnson were permitted to testify, he would testify that on or about the time the decertification petition was filed by employees [*sic*] in Case No. 13-RD-819 on or about July 27, 1971, employee John Schmidt and others informed him voluntarily that they no longer wanted this union to represent them, and that this was the opinion of the majority of the employees in the appropriate unit.

If this belatedly proffered evidence were or should be admitted, opportunity to meet it would have to be afforded General Counsel. However, assuming *arguendo* that such evidence were admitted and had probative value, it would be subject to the same frailty as the decertification petition, i.e., it has reference to events occurring on or about July 27, long after the unfair labor practices here found were committed.

The evidence in support of the unfair labor practices is cogent and, as already indicated, is based, to a considerable extent on the testimony of Robert Johnson, Respondent's president. Without recapitulating that evidence, summarized in the preceding sections, I have found that Johnson made clear to Lambert and to other employees that he did not want the Union, that the employees should drop the Union, that they would be prejudiced if they remained with the Union and that they would be better off without it. I have also found, on the basis of the previously summarized evidence, that Johnson's offer to several employees to sell them company stock was conditioned explicitly or implicitly on their dropping out of the Union. Employees Hale and Wickham, two of the approximately eight employees comprising the appropriate unit, did purchase company stock and Hale, at least, did drop out of the Union. This pattern of conduct would preclude the likelihood of thereafter holding a fair election, even without the elimination of Keith Lambert, a staunch Union adherent, whom I have heretofore found to have been discriminatorily discharged on June 16.

But this conduct does not stand alone. With respect to the May 18 bargaining session between Johnson and Leonardson, the findings are again based in substantial part on Johnson's own testimony. On all the evidence pertaining to that meeting, I conclude that Johnson's participation did not meet the standards of good faith bargaining but rather was characterized by his fixed predetermination to solve his problem by getting rid of the Union. This was confirmed when Johnson later admittedly interrogated the employees as to what went on at a Union meeting, met with the employees on June 4 without their Union representative, asked them individually what they wanted in wages and told them in broad outline what he would grant them in wages and working conditions if there were no union in the plant. Johnson stated that he called the June 4 meeting and made his offer only because the employees asked for the meeting and asked for his offer. However, uniform authority

since *Medo Photo Supply Corporation* v. *N. L. R. B.*, 321 U. S. 678, 683-684 (1944) precludes such direct negotiation with employees who are represented by a bargaining agent. Finally, Respondent's discontinuance of payments to the pension and welfare fund on May 11, 1971, without prior consultation with the Union, was a forbidden unilateral change in a term and condition of employment. The expiration of the collective bargaining agreement between Respondent and the Union is no defense in that regard. See *Henry Hinson, d/b/a Hen House Market No. 3*, 175 NLRB 596 (1969) and cases there cited at fn. 4.[16]

The foregoing course of unlawful conduct—even less would be required—strips of any validity Respondent's claim that the majority status of the Union should be resolved by a representation election. The majority status of the Union on May 1 was undisputed and the first indication that the Union's majority may have been dissipated emerged with the filing of the decertification petition in Case No. 13-RD-819 on or about July 27, 1971, long after the unfair labor practices occurred. The law does not contemplate that Respondent can profit from his own misconduct in this way. Indeed, *N. L. R. B.* v. *Gissel Packing Co.*, 395 U. S. 575 (1969), upon which Respondent relies, is to the contrary. As the Supreme Court there stated (at pp. 599-600), "We agree with the Board's assertion here that there is no suggestion that Congress intended § 9(c)(1)(B) to relieve any employer of his § 8(a)(5) bargaining obligation where, without good faith, he engaged in unfair labor practices disruptive of the Board's election machinery." The Court of Appeals for the Seventh Circuit quite recently reaffirmed the

16. *Manitowoc, Inc.*, 186 NLRB No. 45, relied upon by Respondent, is plainly distinguishable. There, the parties had expressly provided that the pension plan would cease upon termination of the agreement, notice of termination was given the Union, and bargaining ensued. Here there was no provision for automatic termination and the discontinuance occurred on May 11, as stipulated by the parties. No prior notice to the Union was given.

principle. *N. L. R. B.* v. *Copps Corp.* (No. 71-1231, April 18, 1972), 80 LRRM 2054, 2057.

I find that the violation of Section 8(a)(5) and (1) of the Act and the propriety of a bargaining order is fully warranted on this record.

Conclusions of Law

1. By discharging Keith Lambert on or about June 16, 1971 for refusing to drop out of the Union, Respondent has violated Section 8(a)(3) and (1) of the Act.

2. All pattern makers and apprentice pattern makers employed by Respondent at its Aurora, Illinois, plant, excluding office clerical employees, guards, supervisors, and all other employees constitute a unit appropriate for purposes of collective bargaining.

3. At all material times, the Union has been the designated representative of the majority of the employees in the aforesaid unit.

4. By the course of conduct set forth herein, Respondent has refused and is refusing to bargain collectively with the Union as the bargaining representative of the employees in the aforesaid unit in violation of Section 8(a)(5) and (1) of the Act.

Remedy

To effectuate the policies of the Act and enforce its mandate I will direct Respondent to cease and desist from the several unfair labor practices here found. Because of the character and scope of these violations, I shall additionally direct Respondent to refrain from infringing in any manner upon the rights guaranteed its employees under Section 7 of the Act. *Brad's Machine Products, Inc.*, 191 NLRB No. 15 (1971).

Because of the particular circumstances appearing in this case I find it appropriate to circumscribe the affirmative relief which would otherwise be appropriate. It appears that follow-

ing his discriminatory discharge on June 16, 1971, Keith Lambert was later restored to Respondent's payroll and later voluntarily quit. A reinstatement order is therefore not appropriate. A backpay order making Keith Lambert whole for the earnings he did lose as a result of the unlawful discrimination against him is appropriate, however, subject to a set-off of the amounts already transmitted to him under the abortive settlement agreement of October 20, 1971. Similarly, Respondent is entitled to set off amounts it has already paid to the Pension and Welfare Funds under that settlement agreement against the amounts otherwise found to be due because of its unilateral discontinuance of payments to those funds during the period between May 11, 1971 and October 11, 1971.[17] Inasmuch as it appears that Respondent has resumed the Pension and Welfare payments, I believe a cease-and-desist order against further unilateral action will suffice and further affirmative relief is not required in that regard.

I shall also direct Respondent to bargain collectively, upon request, with the Union as the exclusive bargaining representative of the employees in the unit found appropriate here, and to embody any understanding reached in a signed agreement.

To facilitate these ends, the remedial order will include the customary record-keeping and notice-posting provisions. It is noted that Respondent has heretofore posted notices but those notices were posted pursuant to the October 20 settlement agreement which contained a "non--admission" clause. Inasmuch as that settlement agreement was set aside, the remedial value of those notices has been dissipated. Moreover, the significance of the present notices is that they are posted pursuant, not to a settlement agreement with a "non-admission" clause, but pur-

17. Inasmuch as Respondent has already made substantial payments both with respect to backpay for Keith Lambert and with respect to the defaulted payments to the Pension and Welfare Funds, and since in both instances the periods under consideration are relatively brief, I deem it unnecessary to provide for the calculation of the amounts due on a basis of calendar quarters or for interest to be added on the amounts, if any, remaining to be paid.

suant to findings of unfair labor practices made by the Agency after a hearing in which both sides had an opportunity to present evidence.

Upon the foregoing findings of fact and conclusions of law, upon the entire record and pursuant to Section 10(c) of the Act, I recommend the following:[18]

ORDER

Respondent, Fox River Pattern, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

a. Discouraging membership in Pattern, Mold and Model Makers' Association of Chicago and Vicinity, Affiliated With Pattern Makers' League of North America, AFL-CIO, or any other labor organization, by discharging or otherwise discriminating against any employee in regard to the hire and tenure of his employment or any term or condition of his employment.

b. Bypassing the above-named Union, as long as it is the lawful representative of the employees in an appropriate unit, by bargaining directly with the employees in that unit regarding, or unilaterally making any changes in, their wages, hours, or any other term or condition of their employment.

c. Unilaterally discontinuing payments to the Pension and Welfare Funds.

d. Promising, or granting benefits to employees in return for their dropping their membership in the aforesaid Union, or threatening them with reprisals for retaining their membership in the aforesaid Union.

---

18. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

e. Interrogating the employees concerning their activities in the aforesaid Union or actions taken at the meetings of said Union.

f. Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment with the above-named Union as the exclusive bargaining repersentative of all pattern makers and apprentice pattern makers employed by Respondent at its Aurora, Illinois, plant, excluding office clerical employees, guards, supervisors, and all other employees.

g. In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the National Labor Relations Act, as amended:

a. Make whole Keith Lambert for earnings lost as a result of the discrimination against him in the manner set forth in the section of the Trial Examiner's Decision entitled "Remedy."

b. Reimburse the Pension and Welfare Funds for any missed payments in the manner set forth in the above-described "Remedy" section.

c. Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records, Pension and Welfare payment records, and any other records necessary to analyze the amounts due under the terms of this Order.

d. Upon request, bargain collectively in good faith with the above-named Union as the exclusive representative of the employees in the above-described unit, and embody in a signed agreement any understanding reached.

e. Post at its plant in Aurora, Illinois, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 13, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

f. Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.[20]

Dated at Washington, D. C.

/s/ ARNOLD ORDMAN
Arnold Ordman
Trial Examiner

19. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

20. In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

TXD-372-72

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

After a trial in which both sides had an opportunity to present evidence, the National Labor Relations Board has found that we have violated the law, and has ordered us to post this notice.

WE WILL NOT discharge or otherwise discriminate against employees to discourage activities in support of, or membership in, Pattern, Mold and Model Makers' Association of Chicago and Vicinity, Affiliated With Pattern Makers' League of North America, AFL-CIO, or any other union.

WE WILL, to the extent we have not already done so, make whole KEITH LAMBERT for earnings lost as a result of his discharge on June 16, 1971.

WE WILL NOT bypass the above-named Union as long as it is your bargaining representative by bargaining with you directly about your wages, hours, or other terms and conditions of employment.

WE WILL NOT discontinue payments to the Pension and Welfare Funds without bargaining with the above-named Union, and we will, to the extent we have not done so already, reimburse the said Funds for missed payments.

WE WILL NOT promise or grant you benefits if you drop the above-named Union, or threaten you with harm or harm you if you stay in that Union. You are free to belong to or not to belong to or to support or not to support the above-named Union or any other union.

WE WILL NOT ask you questions about your Union membership or activities.

WE WILL, upon request, bargain collectively with the above-named Union as the exclusive bargaining representative of the employees described below about their wages, hours, and working conditions. If an agreement is reached, we will sign such an agreement. These employees are:

> All pattern makers and apprentice pattern makers employed by Fox River Pattern, Inc. at its Aurora, Illinois, plant excluding office clerical employees, guards, Supervisors, and all other employees.

WE WILL NOT in any other manner interfere with the right of employees to engage in self-organization or collective bargaining or to refrain from such activities.

FOX RIVER PATTERN, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, Everett McKinley Dirksen Building, Room 881, 219 S. Dearborn Street, Chicago, Illinois 60604 (Tel. No. 312—353-7572).

APPENDIX F

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of
Fox River Pattern, Inc.
Case No. 13-CA-10792

SETTLEMENT AGREEMENT

The undersigned Charged Party and the undersigned Charging Party, in settlement of the above matter, and subject to the approval of the Regional Director for the National Labor Relations Board, HEREBY AGREE AS FOLLOWS:

Posting of Notice—Upon approval of this Agreement, the Charged Party will post immediately in conspicuous places in and about its plant office, including all places where notices to employees members are customarily posted, and maintain for a period of at least 60 consecutive days from the date of posting, copies of the Notice attached hereto and made a part hereof, said Notices to be signed by a responsible official of the Charged Party and the date of actual posting to be shown thereon. In the event this Agreement is in settlement of a charge against a union, the union will submit forthwith signed copies of said Notice to the Regional Director who will forward them to the employer whose employees are involved herein, for posting, the employer willing, in conspicuous places in and about the employer's plant where they shall be maintained for a period of at least 60 consecutive days from the date of posting.

Compliance with Notice—The Charged Party will comply with all the terms and provisions of said Notice.

Backpay—The Charged Party will make whole Keith Lambert for any loss of pay suffered as a result of the discrimination against him in the amount of $1,556.80.

Pension Fund—The Charged Pary will reimburse the Pattern Makers Pension Fund in the amount of $1,247.40 for the period from May 1, 1971 to September 30, 1971 and make payments of 35¢ per hour for all employees in the bargaining unit effective October 1, 1971, to the Pattern Makers' Welfare Fund.

Non-Admission—By entering into this Settlement Agreement and posting the Notice to Employees, the Company does not admit and specifically denies having violated any of the provisions of the National Labor Relations Act or any other Federal or State statute.

Dismissal of Petition—By entering into this Settlement Agreement and posting the Notice to Employees, the Company does not admit and specifically denies that there does not presently exist a question concerning representation and that the Petitioner in Case No. 13-CA-10792 should be dismissed.

Refusal to Issue Complaint—In the event the Charging Party fails or refuses to become a party to this Agreement, then, if the Regional Director in his discretion believes it will effectuate the policies of the National Labor Relations Act, he shall decline to issue a Complaint herein (or a new Complaint if one has been withdrawn pursuant to the terms of this Agreement), and this Agreement shall be between the Charged Party and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 102.19 of the Rules and Regulations of the Board if a request for same is filed within 10 days thereof. This Agreement is contingent upon the General Counsel sustaining the Regional Director's action in the event of a review. Approval of this Agreement by the Regional Director shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in this case.

Performance—Performance by the Charged Party with the terms and provisions of this Agreement shall commence im-

mediately after the Agreement is approved by the Regional Director, or, in the event the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of advice that no review has been requested or that the General Counsel has sustained the Regional Director.

Notification of Compliance—The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Charged Party has taken to comply herewith. Such notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. In the event the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in the above case.

	THE PATTERN MAKERS' LEAGUE OF NORTH AMERICA, CHICAGO ASSOCIATION.
FOX RIVER PATTERN, INC.	
(Charged Party)	*(Charging Party)*
By: /s/ HERBERT M. BERMAN	By: /s/ JOHN LEONARDSON,
Attorney	*Bus. Mgr.*
(Name and Title)	*(Name and Title)*
Date: October 20, 1971	Date: Oct. 20, 1971
Recommended: 10-20-71	Approved: October 20, 1971
(Date)	*(Date)*
By: /s/ RUSH F. HALL	By: /s/ ROSS M. MADDEN
Board Agent	*Regional Director*
	National Labor
	Relations Board

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A SETTLEMENT AGREEMENT APPROVED BY A REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE Hereby Notify Our Employees That:

WE WILL make whole Keith Lambert for any loss of pay suffered as a result of the discrimination against him.

WE WILL NOT discriminate against employees because of their membership in or activities in behalf of the Pattern Makers' League of North America, Chicago Association.

We WILL NOT bypass the Pattern Maker's League of North America, Chicago Association, as long as they are the lawful representative of all employees in an appropriate bargaining unit, by bargaining individually with our employees regarding their wages, hours, and working conditions, or unilaterally making any change in wages, hours or working conditions.

WE WILL NOT unlawfully promise our employees benefits in return for their dropping their Union membership. All our employees are free to become or remain, or not become or not remain, members of the Pattern-Makers' League of North America, Chicago Association, or any other labor organization.

WE WILL resume payments to the Pattern Makers Pension and Welfare Funds and make employees whole for any loss they may have incurred as a result of the failure to make such payments to the Pattern Makers Pension Fund.

WE WILL bargain collectively, upon request, in the event the dismissal of the petition in Case No. 13-RD-819, is either not appealed, or if appealed is sustained by the Board and no valid question concerning representation exists, with The Pattern Makers' League of North America, Chicago Association,

as the exclusive representative of all employees in the bargaining unit set forth in the parties' contract which expired on May 1, 1971, to wit: "all pattern makers and their apprentices employed by the Employer and excluding all clerical employees, guard, professional employees and supervisors as defined in the Act, and all other employees," with respect to rates of pay, hours of employment or other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

FOX RIVER PATTERN, INC.
(Employer)

Dated: ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced,

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-611

FOX RIVER PATTERN, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 25, 1974

/s/ William H. Rehnquist
Associate Justice of the Supreme Court of the United States

Dated this 18th day of December, 1973

APPENDIX H

RELEVANT PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED.

SEC. 3(d). There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. . . .

* * * * *

Sec. 9(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section

9(a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the result thereof.

* * * * *

RELEVANT PROVISIONS OF RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE OF NATIONAL LABOR RELATIONS BOARD

(29 C. F. R.) SEC. 101.7 *Settlements.*—Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the regional director, provide for an appeal to the general counsel, as described in section 101.6, by a complainant who will not join in a settlement or adjustment deemed adequate by the regional director. Proof of compliance is obtained by the regional director before the case is closed. If the respondent fails to perform his obligations under the informal agreement, the regional director may determine to institute formal proceedings.

* * * * *

SEC. 102.19. *Settlement after issuance of complaint:* (29 C. F. R.)

RIGHTS OF EMPLOYEES

(c)(2) If the settlement agreement approved by the regional directors is a formal one, providing for the entry of a Board order, the settlement agreement together with the charging party's objections and the regional directors' written statements, are submitted to Washington, D. C., where they are reviewed by the general counsel. If the general counsel decides to approve the settlement agreement, he shall so inform the charging party and submit the agreement and accompanying documents to the Board, upon whose approval the settlement is contingent. Within 7 days after service of notice of submission of the settlement agreement to the Board, the charging party may file with the Board in Washington, D. C., a further statement in support of his objections to the settlement agreement.

* * * * *

No. 73-1152

In the Supreme Court of the United States

OCTOBER TERM, 1973

FOX RIVER PATTERN, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel.

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel.

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board,
Washington, D. C. 20570.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and rules involved	2
Statement	3
A. The Board Proceeding	3
B. The court of appeals decision	8
Argument	9
Conclusion	13

CITATIONS

Cases:

Big Three Industries, Inc., 201 NLRB No. 76, 82 LRRM 1411	11
Daisy's Originals Inc. of Miami v. *National Labor Relations Board*, 468 F. 2d 493	13
Gissel Packing Co. v. *National Labor Relations Board*, 395 U.S. 575	12
International Photographers of the Motion Picture Industries, Local 659, 197 NLRB No. 134, 81 LRRM 1223, enforced, 477 F.2d 450, certiorari denied. No. 73-494, January 21, 1974	10, 11
Jackson Mfg. Co., 129 NLRB 460	11
Lincoln Bearing Co. v. *National Labor Relations Board*, 311 F.2d 48	11
National Labor Relations Board v. *A. W. Thompson, Inc.*, 449 F.2d 1333, certiorari denied, 405 U.S. 1065	12

Cases—Continued Page

National Labor Relations Board v. *Bangor Plastics, Inc.*, 392 F.2d 772 11
National Labor Relations Board v. *Patent Trader, Inc.*, 426 F.2d 791, reversing *en banc*, in relevant part, 415 F.2d 190 12
Rogers Manufacturing Co. v. *National Labor Relations Board*, 486 F.2d 644 11
United Dairy Co., 146 NLRB 187 11
Wallace Corp. v. *National Labor Relations Board*, 323 U.S. 248 8, 9

Statute and regulation:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

Section 8(a)(1) 2, 3
Section 8(a)(3) 2, 3
Section 8(a)(5) 3

In the Supreme Court of the United States

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is not yet officially reported. The Board's decision and order (Pet. App. A12-A51) are reported at 199 NLRB No. 12.

JURISDICTION

The judgment of the court of appeals (Pet. App. A9-A10) was entered on November 19, 1973. On

December 18, 1973, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to January 25, 1974 (Pet. App. A57), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board's Regional Director properly withdrew approval of a settlement agreement and issued an unfair labor practice complaint.

2. Whether the Board properly issued a bargaining order as a remedy for the unfair labor practices found.

STATUTE AND RULES INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and of the Board's Rules and Regulations and Statements of Procedure are set forth at Pet. App. A58-A60. Also relevant are the following sections of the Act:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> >
> > * * * *
> >
> > (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or

discourage membership in any labor organization: * * *

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

A. The Board Proceeding

1. The Company—which manufactures patterns, castings, and molds—and the Union were parties to a collective bargaining agreement covering the Company's pattern makers. On February 26, 1971, about five weeks before the agreement was due to expire, the Union requested negotiations for a new agreement (Pet. App. A16-A17). Thereafter, from March through June 1971, the Company engaged in the following conduct which the Board, in the present proceeding, found violated Section 8(a)(1), (3) and (5) of the Act: [1]

The Company told employees and union representatives, who were attempting to negotiate a new agreement, that it no longer wanted to operate with a union agreement and that, if it were forced to, it would not be able to provide work for the unionized employees (Pet. App. A25-A26, A32-A33, A35-A36; A. 98-99, 164-166, 242-243).[2] It offered stock in the Company to employees on the condition that they re-

[1] Petitioner does not dispute these findings here.

[2] "A." references are to the appendix in the court of appeals.

sign from the Union, which offer at least one employee accepted (Pet. App. A26, A35; A. 100-101). It discontinued payments to the Union Welfare and Pension Fund, while informing an employee that it was prepared to set up its own fund if the employees quit the Union (Pet. App. A26; A. 101). It attempted to bargain with its employees individually, informing them if there were no union the Company would "give them something comparable which everyone would be satisfied with" (Pet. App. A27-A28, A30, A37; A. 104-106, 246-252); and it discharged employee Lambert because he refused to quit the Union and accede to the terms proposed by the Company in individual bargaining (Pet. App. A28, A39-A40; A. 106-108). Finally, the Company engaged in "surface bargaining" with the Union with no intent to reach an agreement (Pet. App. A36).

On July 27, 1971, employee John Schmidt filed a petition with the Board's Regional Director to decertify the Union as bargaining representative of the employees—Case No. 13-RD-819 (Pet. A17). On August 2 and September 29, the Union filed unfair labor practice charges respecting the Company conduct outlined above. On October 20, prior to the issuance of a complaint, the Company and the Union entered into an informal settlement agreement of the pending charges that was approved by the Board's Regional Director (Pet. App. A17, A52-A59).

In the settlement agreement, the Company, while denying the commission of any unfair labor practices, agreed to refrain from the conduct with which it was

charged (Pet. App. A52, A55-A56). The agreement further provided that the Company would make whole employee Lambert for the earnings he lost as a result of alleged discrimination, begin making payments to the Union's Welfare and Pension Fund, make up unpaid contributions to the Fund, and post notices (Pet. App. A52-A53). Finally, the agreement provided that the Company would bargain collectively with the Union, upon request, provided:

> the dismissal of the petition in Case No. 13-RD-819 is either not appealed, or if appealed, is sustained by the Board and no valid question concerning representation exists * * *. [Pet. App. A55-A56].

The following day, October 21, the Regional Director dismissed the petition in Case No. 13-RD-819 (Pet. App. A18). On October 29, employee Schmidt appealed the dismissal to the Board (*ibid.*). On November 23, the Board remanded the matter to the Regional Director "for further appropriate action, to wit, either process the instant petition or proceed to a definitive disposition of the refusal to bargain charge in [the instant unfair labor practice case]" (Pet. App. A18; A. 32). On December 30, the Acting Regional Director withdrew approval of the settlement agreement and issued an unfair labor practice complaint on the Union's charges (Pet. App. A18-A19; A. 33, 40-44).

2. On January 21, 1972, the Company filed a motion to dismiss the complaint on the ground that the

settlement agreement disposed of all matters in issue, that no new unfair labor practices had been alleged, and that the decertification petitions negated any obligation to bargain with the Union (Pet. App. A15, A16; A. 45).[3] The Board, upholding the Trial Examiner, refused to dismiss the complaint.

The Board rejected petitioner's contention that, absent new unfair labor practices, the settlement could not be abrogated.

> The design and the desirability of a settlement agreement is to lay disputed matters to rest * * *. [I]t is to restore, as effectively and expeditiously as possible, the labor peace which it is the purpose of the Act to achieve. Where the

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[3] While Schmidt's appeal from the dismissal of the decertification petition was pending before the Board, the Company paid employee Lambert his lost earnings, made up its unpaid contributions to the Union Welfare and Pension Fund, and posted the notices required by the settlement agreement (Pet. App. A18). However, since there had been no resolution of the decertification petition, as provided in the settlement agreement, no bargaining negotiations were instituted (*ibid.*). After the Regional Director issued the instant complaint, employee Schmidt filed a second petition to decertify the Union (Pet. App. A19). On January 26, 1972, the Regional Director dismissed the two decertification petitions, finding that, since the instant unfair labor practice complaint had issued, no question concerning representation existed (Pet. App. A19). The dismissals were appealed to the Board, which sustained the Regional Director's action shortly before the hearing in the instant case opened (Pet. App. A19; A. 31). At the hearing, the Union stated its desire to abide by the spirit of the settlement agreement and commence bargaining with the Company, but the Company took the position that it was no longer obligated to bargain with the Union (Pet. App. A19).

> settlement agreement achieves this end, it would be a disservice to the parties involved and to the policies of the Act to set aside a settlement agreement and resuscitate a dispute which has already been laid to rest. But this is true only where the dispute has been effectively laid to rest. Where, because of new and independent unfair labor practices, or for other reasons, the settlement agreement "has failed its purpose" *Jackson Manufacturing Company*, [129 NLRB 460], there is no estoppel to further Board proceedings. *Wallace Corporation* v. *N.L.R.B.*, 323 U.S. 248, 254 (1944). [Footnote omitted.] [Pet. App. A20-A21.]

The Board concluded that "the settlement agreement here has failed of its purpose" (Pet. App. A21):

> [O]n the critical issue of [the Company's] alleged refusal to bargain, the agreement, for reasons beyond the control of the parties, could not be consumated * * *. Respondent conditioned its willingness to bargain upon final dismissal of the pending decertification petition. The face of the settlement agreement contemplated the dismissal of the decertification petition or, alternatively, the processing of that petition. If the Board, on appeal, sustained the Regional Director's dismissal of the petition, Respondent would have been obligated to bargain under the terms of the settlement agreement. If the Board, on the other hand, reversed the Regional Director, the decertification petition would have been processed and the question concerning representation duly resolved. The Board did neither and, instead, remanded the matter to the Regional

> Director. * * * [T]he Board's action left the critical question concerning representation which lay at the heart of this controversy unresolved and, to that extent, frustrated the scheme of the settlement agreement * * *. [Pet. App. A21-A22.]

The Board held that the Company had engaged in the unfair labor practices noted above. It entered a remedial order, which required the Company, *inter alia*, to bargain with the Union (Pet. App A48). In issuing a bargaining order, the Board rejected the Company's contention that an election should be held to determine the Union's majority status. The Board pointed out (Pet. App. A44):

> The majority status of the Union on May 1 was undisputed and the first indication that the Union's majority may have been dissipated emerged with the filing of the decertification petition in Case No. 13-RD-819 on or about July 27, 1971, long after the unfair labor practices occurred. The law does not contemplate that Respondent can profit from his own misconduct in this way * * *. [Pet. App. A44.][4]

B. The Court of Appeals Decision

The court of appeals upheld the Board's decision and enforced its order (Pet. App. A8). The court (with one judge dissenting) concluded that *Wallace Corp.* v. *National Labor Relations Board*, 323 U.S. 248, "clearly authorizes the Board to disavow a settle-

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[4] The Board further found that, in any event, the Company's "pattern of conduct would preclude the likelihood of thereafter holding a fair election" (Pet. App. A43).

ment which would frustrate the purposes of the Act" [footnote omitted] (Pet. App. A5). The court further concluded that a bargaining order was appropriate since the Union was an incumbent which had "the unquestioned authority to represent the unit employees" at the time "the company's refusal to bargain occurred" (Pet. App. A7).

ARGUMENT

1. Contrary to petitioner's contention (Pet. 6-9), the Board's power to reject a settlement agreement is not limited to the situation where subsequent unfair labor practices occur. This Court has recognized that, while "the Board has established as a working rule the principle that it ordinarily will respect the terms of a settlement agreement approved by it," it "has consistently gone behind such agreement * * * where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose, or where there has been a subsequent unfair labor practice" (footnotes omitted). *The Wallace Corp* v. *National Labor Relations Board*, 323 U.S. 248, 254-255.

The settlement agreement did not resolve all of the issues between the parties; indeed, it did not bind all of those interested in the dispute. The agreement was between the Company and the Union and the Company's obligation to bargain was expressly conditioned on dismissal of the decertification petition. Employee Schmidt who filed the decertification petition was not a party to the settlement agreement.

An employee filing a decertification petition is entitled to have the petition processed unless prior unfair labor practices preclude the holding of a fair election. As the court of appeals held, "* * * certainly, a settlement between the Company and the Union should not foreclose a valid attack on the Union's representative status" (Pet. App. A6). Thus, on the Board's order of remand the Regional Director was confronted with two choices: "either to abide by the settlement and process the decertification petition or else to withdraw approval of the settlement and process the complaint" (Pet. App. A6).

The Director, finding that the Company's prior unfair labor practices were such as to preclude the raising of a valid question of representation and that the Company was still refusing to bargain with the Union, properly adopted the latter course. To permit the Company, in these circumstances, to avoid its obligation to bargain with the Union simply because the Director neglected to dismiss the decertification petition before he withdrew his approval of the settlement and issued a complaint,[5] would be to exalt form over substance.[6]

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[5] The decertification petition was dismissed before the opening of the Board hearing (n. 3, *supra*).

[6] Contrary to petitioner's contention (Pet. 6), this is not the first time the Board has withdrawn a settlement agreement where there have been no subsequent unfair labor practices. See, *e.g.*, *International Photographers of the Motion Picture Industries, Local 659*, 197 NLRB No. 134, 81 LRRM

In effect, the settlement agreement would have permitted the Company to isolate the unfair labor practices from the representation issue. Notwithstanding that it had engaged in practices which the Board subsequently found precluded a fair election, the Company would have been free to challenge the union's majority status. The Company attempted to accomplish precisely that in filing a memorandum in support of the appeal of the dismissal of the decertification petition. Such a result is directly contrary to the Board's blocking charge rule, which precludes processing of a decertification petition where a meritorious unfair labor practice charge has been filed (Pet. App. A3, n.3). The Regional Director was thus correct in setting aside the settlement agreement. See *Big Three Industries, Inc.*, 201 NLRB No. 76, 82 LRRM 1411.

1223, enforced, 477 F. 2d 450 (C.A. 9), certiorari denied, January 21, 1974, No. 73-494.

The cases petitioner cites (Pet. 6) are inapposite. *Rogers Manufacturing Co.* v. *National Labor Relations Board*, 486 F. 2d 644, 646-647 (C.A. 6), *Lincoln Bearing Co.* v. *National Labor Relations Board*, 311 F. 2d 48, 50 (C.A. 6), and *Jackson Mfg. Co.*, 129 NLRB 460, 462, involved the question whether subsequent unfair labor practices had been committed which would justify setting aside an otherwise effective settlement agreement. *National Labor Relations Board* v. *Bangor Plastics, Inc.*, 392 F. 2d 772, 775 (C.A. 6), involved the question whether a party violates a settlement agreement by posting a separate notice, adjacent to the notice required by the agreement, stating that it had complied only to avoid litigation. *United Dairy Co.*, 146 NLRB 187, 189, involved the issue whether a charging party who did not join in a settlement, but who did not take a timely appeal to the Board, could subsequently challenge the settlement.

2. There is no substance to petitioner's further contention (Pet. 9-10) that, under the principles enunciated in *Gissel Packing Co.* v. *National Labor Relations Board*, 395 U.S. 575, a bargaining order could not properly be issued without a finding that a fair election could not be held. *Gissel* holds that an employer may properly insist that a union which has just organized his employees establish its majority through a Board election, unless the employer, by his own misconduct, has precluded the holding of a fair election. The principle is not applicable where, as here, the employer seeks to withdraw recognition from a union which it has previously recognized as the employees' representative. For, in that situation, the union is not required to establish its majority status; that status is presumed unless the employer can establish a reasonable and "good faith" basis for believing that the union has lost its majority. See, *e.g.*, *National Labor Relations Board* v. *A. W. Thompson, Inc.*, 449 F. 2d 1333, 1337 (C.A. 5), certiorari denied, 405 U.S. 1065; *National Labor Relations Board* v. *Patent Trader, Inc.*, 426 F. 2d 791 (C.A. 2), reversing, *en banc*, in relevant part, 415 F. 2d 190 (C.A. 2).

But even if *Gissel* were applicable, it was satisfied here. The Examiner found that the Company's unfair labor practices "would preclude the likelihood of thereafter holding a fair election" (Pet. App. A43). This conclusion was fully justified, since the Company's unfair labor practices included discharging an employee who refused to foreswear union allegiance,

and threatening a dimunition of work for unionized employees.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] In *Daisy's Originals Inc. of Miami* v. *National Labor Relations Board*, 468 F. 2d 493 (C.A. 5) (Pet. 9), unlike here, the court found that the company's Section 8(a)(1) violations were not the genesis of the employees' abandonment of the union and had a minimal effect on the employees' union support (*id.* at 502, 503).

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